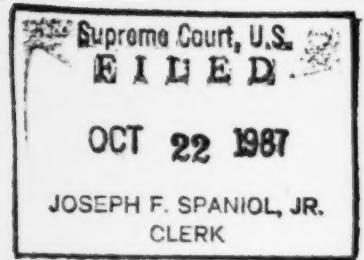


87-683



CASE NO. A-231

IN THE
SUPREME COURT OF THE UNITED STATES

DEAN GALLOWAY, SHERIFF,
Holmes County, Florida,

Petitioner,

vs.

JIMMY JOSEY

Respondent.

PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

ANDREA SMITH HILLYER
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160 10/27



QUESTIONS PRESENTED FOR REVIEW

WHERE A PETITIONER IN AN
ASYLUM STATE HABEAS CORPUS
PROCEEDING FILED TO CONTEST
EXTRADITION PRESENTS
EVIDENCE THAT HE IS NOT A
FUGITIVE, IS THE EXTRADITION
WARRANT AND ANNEXED
DOCUMENTATION, WITHOUT
MORE, SUFFICIENT TO CREATE
CONFLICTING OR CONTRADICTORY
EVIDENCE REQUIRING
REMAND?

WHETHER HEARSAY AFFIDAVITS,
UNSWORN STATEMENTS OF ABSENT
WITNESSES, AND EX PARTE
AFFIDAVITS ARE ADMISSIBLE
IN STATE HABEAS CORPUS
PROCEEDINGS FILED TO
CONTEST INTERSTATE
EXTRADITION.

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PREFACE

The Petitioner, Dean Galloway, as Sheriff of Holmes County, Florida, ex. rel the State of Florida, was the appellee in the District Court of Appeal, First District of Florida, and was the Petitioner in the Supreme Court of Florida. The Respondent, Jimmy Josey, was the Appellant in the District Court of Appeal, First District of Florida, and was the Respondent in the Supreme Court of Florida. In this petition, the parties will be referred to as they appear before this Court.

The following reference is made in this petition:

(A) For the portions of the record below, sufficient to show jurisdiction in this Court, which are contained in the Petitioner's appendix and consist of pages A-1-128.

OPINIONS BELOW

The opinion of the Supreme Court of Florida was rendered on April 16, 1987. This decision is reported at 507 So.2 590, and is reproduced in Petitioner's Appendix at A-3. Petitioner's Motion for Rehearing (A-21) was denied by the Supreme Court of Florida on June 24, 1987 and such order is reproduced at A-1.

The opinion of the District Court of Appeal, First District of Florida, was rendered on September 26, 1985. This decision is reported at 482 So.2 376, and is reproduced in Petitioner's Appendix at A-73.

The order of the State trial court denying the petition for writ of habeas corpus, rendered May 4, 1984, is not reported but is reproduced at A-111.

GROUNDS UPON WHICH
JURISDICTION IS INVOKED

 The opinion of the Supreme Court of Florida was rendered on April 16, 1987. The Petitioner's timely motion for rehearing was denied by the Supreme Court of Florida on June 24, 1987. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1257(3) and Rule 17(1)(b) and (c), Rules of the Supreme Court of the United States. This is a civil case.

 Due to the summary nature of extradition, this case presents an issue which is capable of repetition yet continually avoiding review.

FEDERAL CONSTITUTIONAL PROVISIONS
AND STATUTES INVOKED

Article IV, Section 2, Clause 2,
of the United States Constitution, provides
as follows:

A person charged in any State
with Treason, Felony, or other Crime,
who shall flee from Justice, and
be found in another State, shall
on Demand of the executive Authority
of the State from which he fled,
be delivered up, to be removed to
the State having jurisdiction of
the Crime.

Title 18 U.S.C. §3182 implements the above
provision, and provides as follows:

Wherever the executive authority
of any state or Territory demands
any person as a fugitive from justice,
of the executive authority of any
State, District or Territory to which
such person has fled, and produced
a copy of an indictment found or
an affidavit made before a magistrate
of any State or Territory, charging
the person demanded with having committed
treason, felony, or other crime,
testified as authentic by the governor
or chief magistrate of the State
or Territory to which such a person
has fled shall cause him to be arrested
and secured, and notify the executive
authority making such demand, or
the agent of such authority appointed
to receive the fugitive, and shall
cause the fugitive to be delivered
to such agent when he shall appear.

Florida's adoption of the Uniform Criminal Extradition Act (Section 941.01 - 941.29, Fla. Stat. 1941) includes Section 941.02 which specifically provides:

§ 941.02 FUGITIVES FROM JUSTICE: DUTY
OF GOVERNOR

Subject to the provisions of this chapter, the provisions of the Constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any persons charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

STATEMENT OF THE CASE

On March 8, 1984, the Governor of Alabama issued a requisition warrant demanding the extradition of Respondent Jimmy Josey from the State of Florida (A-116). The Requisition Warrant (or demand), certified as authentic by the Governor of Alabama, sought Respondent's extradition on the basis that Respondent stood charged with theft of property, second degree, committed in Henry County, Alabama. The Alabama governor represented in his warrant that Respondent was a fugitive from justice.

Annexed to the Alabama Requisition Warrant were the following documents:

- 1) a sworn application for requisition executed by the District Attorney for the 20th Judicial Circuit of Alabama, alleging that Respondent committed the crime on October 16, 1983 in the city of Headland, Alabama and that Respondent was present in Alabama at the time of

the offense and thereafter fled to Florida (A-118); and, 2) an indictment returned by the grand jury of Henry County, Alabama charging Respondent with the crime of theft of property to wit, over ten tons of fertilizer (A-124).

On March 26, 1984 the Governor of Florida issued a rendition warrant for the arrest of Respondent, pursuant to the demand received from the Governor of Alabama (A-113). Once the Florida Governor's warrant was served on Respondent, the Florida trial court set a hearing to hear Respondent's previously filed petition for writ of habeas corpus. Respondent's petition contested extradition by raising two issues: 1) that he was not substantially charged with a crime, and 2) that he was not a fugitive from justice in that he was present in the State of Florida at all times.

The Florida trial court held a hearing on Respondent's petition on April 17, 1984. During the hearing, counsel for the State of Florida introduced into evidence the extradition warrants and annexed documents. Respondent testified that he was not in Alabama on October 16, 1983.¹

Respondent's wife testified that Respondent was home (in Florida) all day on October 16 except for thirty minutes. Four other witnesses testified that they saw Respondent in Florida on October 16 for varying periods of time between 8:30 a.m. and 5:30 p.m. On May 4, 1984 the Florida trial court denied Respondent's petition for writ of habeas corpus, finding no legal reason to bar Alabama from returning

¹ Respondent testified that he had been at the Golden Plant Food Company (in Headland, Alabama) in either March, April or May of 1983. Respondent admitted he had been employed by the Golden Plant Food Company and that the company had shipped 3700 gallons of fertilizer to his home.

Respondent to answer the criminal charge of theft of property (A-111). The writ also stayed Respondent's extradition.

Respondent filed an appeal in the First District Court of Appeal, or intermediate appellate state court. The First District issued an opinion on September 26, 1985 reversing and remanding back to the trial court with instructions for the court to make a finding of fact as to whether Respondent was a fugitive. The First District certified conflict with another intermediate state court decision to the State Supreme Court on the issue of whether merely conflicting or contradictory evidence on the issue of fugitivity requires denial of habeas corpus relief in an extradition case (A-73). The Florida Supreme Court accepted jurisdiction and issued an opinion on April 16, 1987 (A-3).

The Florida Supreme Court rejected the "conflict of evidence" standard espoused

by this court in South Carolina v. Bailey, 289 U.S. 412 (1933) and later cases, and adopted the standard found in Walton v. State, 566 P2 765 (Idaho, 1977), contrary to established federal precedent found in South Carolina v. Bailey, 289 U.S. 412 (1932) and Pakulski v. Hickey, 731 F.2 382 (6th Cir. 1984).

REASONS FOR GRANTING THE WRIT

As will be demonstrated in this petition, the questions involved present a federal question decided by Florida's highest court in conflict with various federal court of appeals, and in conflict with established precedent of this Court. The decision of the Florida Supreme Court below undermines the purpose of Article IV, Section 2 of the United States Constitution and devastates the principle of federalism inherent in the scheme of interstate extradition.

This Court recently reaffirmed that the extradition clause contains mandatory language with two intended purposes:

- 1) to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed,
- and 2) to preclude any state from becoming a sanctuary for fugitive from justice

of another state. Puerto Rico v. Branstad, 107 S.Ct. 2802 (1987). The Framers understood that frustration of those objectives would seriously impede national unity and endanger the internal safety of the states. *Id.*, Biddinger v. Commissioner of Police, 245 U.S. 128 (1917); Appleyard v. Massachusetts 203 U.S. 222 (1906); Kentucky v. Dennison 24 How. 66 (1861). Likewise, Congress in enacting 18 USC §3182 intended extradition to be a summary procedure, and this Court recently repeated that extradition proceedings are to be kept within narrow bounds and are emphatically not the appropriate time or place for entertaining defenses or determining the guilt or innocence of the charged party. California v. Superior Court of California, 107 S.Ct. 2433 (1987). This Court again reemphasized that asylum state courts are limited to the four issues set forth in Michigan v. Doran, 439 U.S. 282 (1978):

a) whether the extradition documents on their face are in order; b) whether the petitioner has been charged with a crime in the demanding state; c) whether the petitioner is the person named in the request for extradition; and d) whether the petitioner is a fugitive." 439 U.S. at 289.

In South Carolina v. Bailey, 289 U.S.

412 (1932), this Court held that a petitioner raising the issue of fugitivity should not be discharged unless he shows by clear and satisfactory evidence that he was outside of the demanding state at the time of the offense. In clarifying the above, this Court went further and stated that a petitioner should prevail on that issue unless it appeared beyond reasonable doubt that he was not in the demanding state when the offense was committed. 289 U.S. at 422. This Court explained that when the record discloses only a

conflict of evidence, then the petitioner has not yet met his burden of clear and satisfactory evidence beyond a reasonable doubt.

Earlier, in Munsey v. Clough, 196 U.S. 364 (1904), this Court held that a habeas court will not discharge a defendant arrested under a governor's warrant where there is merely contradictory evidence on the subject of presence in an absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to guilt or innocence of the accused.

Since those decisions, state and federal courts have uniformly applied the 'mere conflict' or 'merely contradictory' standard in upholding extradition. These courts have also applied variations of the 'clear and satisfactory evidence,

beyond a reasonable doubt' burden of proof when faced with the fugitivity issue.¹

¹ State courts have utilized the following standards: 1) "clear and convincing evidence," Johnson v. Cronin, 690 P.2d 1277 (Colo. 1984); Vigil v. Martinez, 661 P.2d 1164 (Colo. 1983); Miller v. Debekker, 668 P.2d 927 (Colo. 1983); Langley v. Hayward, 656 P.2d 1020 (Utah 1982); Lott v. Bechtold, 289 S.E.2 210 (W.Va. 1982); Kerr v. Watson, 649 P.2d 1234 (Idaho App. 1982); Light v. Cronin, 621 P.2d 309 (Colo. 1980); Walton v. State, 566 P.2d 765 (Idaho 1977); Baker v. Laurie, 375 A.2d 405 (R.I. 1977); 2) "clear and satisfactory evidence," Petition of Upton, 439 N.E.2d 1216 (Mass. 1982); Hill v. Houch, 195 N.W.2d 195 (Iowa 1972); People ex rel Evelord v. Harrell, 87 N.E.2d 765 (Ill. 1949); 3) "clear evidence," People ex rel Hall v. Casscles 378 N.Y.S.2d 813 (N.Y. App. Div. 1976); 4) "conclusively or beyond a reasonable doubt," Crumpton v. Owen, 376 So.2d 641 (Miss. 1979); Johnson v. Ledbetter, 348 So.2d 506 (Miss. 1976); 5) "clear and convincing or beyond a reasonable doubt," Ex Parte Riccardi, 203 P.2d 627 (Ariz. 1949); 6) "beyond a reasonable doubt," Barrila v. Blake, 461 A.2d 1375 (Conn. 1983); Balzudua v. Hannahan, 592 P.2d 512 (N. Mex. 1979); In Re Hart, 583 P.2d 411 (Montana 1978); People ex rel O'Mara v. Ogilvie, 220 N.E.2d 172 (Ill. 1966); Reeves v. Thompson, 288 S.W.2d 451 (Tenn. 1956); People v. Boswell, 500 N.E.2d 116 (Ill. App. 1986); State v. Barone, 486 N.E.2d 1157 (Ohio App. 1984); Bryson v. Warden, Baltimore City Jail, 413 A.2d 554 (Ind. App. 1980); 7) "substantial and convincing proof," TinaJero

However, regardless of which burden of proof standard utilized, the courts have routinely refused to deny extradition where there is a conflict in evidence. In short, the long established rule has been that a mere conflict in evidence is not sufficient to warrant a discharge of custody. Pakulski v. Hickey, 731 F.2d 382 (6th Cir. 1984); United States v. Flood, F.2d 554 (2nd Cir. 1967); cert. denied, 388 U.S. 919; Lee Won Sing v. Cottone, 123 F.2d 169 (D.C. Cir. 1941).² The fugitive's burden is heavy, but it arises legitimately from the nature of an extradition proceeding, since essentially the habeas court is reviewing the factual determination of the governor as to the

v. Schweitzer, 658 S.W.2d 38 (Mo. App. 1983); and 8) "conclusively," People v. Babb, 123 N.E.2d 639 (Ill. 1955); Manning v. Commonwealth, 344 S.E.2d 151 (Va. App. 1983).

²Id.

presence of the accused in the demanding state, and the guilt or innocence of the accused is not in question. Smith v. Idaho, supra at 156.

The Florida Supreme Court, in its decision below, specifically rejected the above established precedent:

"Based on our reading of Bailey and the Florida Uniform Interstate Extradition Act, we find that conflict of evidence is not the appropriate standard for testing a petitioner's challenge. The sole question is whether the petitioner has defeated the presumption of validity with clear and convincing proof he was not in the demanding jurisdiction when the crime occurred." (A-15)

The Florida Supreme Court further held that if the state wishes to present evidence to rebut the fugitive's evidence, the use of affidavits and other hearsay not

based on firsthand knowledge is insufficient to meet the state's burden of proof.

(A-16)

The result of that ruling is to turn each extradition habeas hearing in the state of Florida into a mini-evidentiary hearing on the issue of presence in the demanding state. Prior to this decision, the courts in Florida followed the established federal precedent in that once merely conflicting or contradictory evidence was presented on the issue of fugitivity, any further inquiry into the weight or quality of the evidence ended and the fugitive was remanded for extradition. Additionally, hearsay affidavits and ex parte affidavits were considered, in accordance with federal court pronouncements upon that issue. See, Munsey v. Clough, supra; Smith v. Idaho, supra. Now, under the decision below, fugitives in Florida are able to regularly defeat extradition simply

by presenting evidence contrary to the presumption of fugitivity, since it is extremely impractical, if not impossible, for a demanding state to meet the technical rules of evidence in a 'trial' in Florida on the issue of fugitivity.

The issue of fugitivity should not operate to defeat extradition today since the factual determination of absence from the demanding state is essentially an alibi defense which should only be decided by the courts of the demanding state .

A fugitive should not be entitled to two separate trials in two separate states.

Whaley v. State, 328 So.2 720 (Ga. 1983).

Testimony and evidence that a defendant was not present in the demanding state on the date of the offense is a defense to the offense, and should not operate to defeat extradition unless the evidence is so clear and satisfactory beyond a reasonable doubt that there is absolutely

no doubt that the defendant could not have been in the demanding state on that date. South Carolina v. Barley, supra.

A clear example of such evidence would be asylum state prison records showing that the accused was incarcerated in the asylum state on that date. Given the ease and frequency of air travel existing today, it is possible for an accused to eat breakfast in Florida, commit numerous crimes in other states, and return home to Florida for dinner the same day. Because criminals today are able to travel widely with more frequency, the fugitivity issue often presents complex evidentiary problems in asylum state habeas corpus hearings.

As a result of the decision below, extradition in Florida is no longer a summary procedure. Florida prosecutors now have to abide by stricter rules of evidence in attempting to rebut a fugitive's evidence, and a fugitive can now easily

rebut the presumption of fugitivity established by the governor's warrant and annexed documentation. The Florida Supreme Court ignored the wise statement of this Court in Bailey at page 419, that "[i]t is not possible to say with certainty where the truth lies."

CONCLUSION

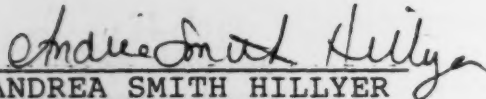
This court should accept jurisdiction and grant certiorari in order to clarify these issues, for the benefit of all fifty states and the territories. The intent of the Framers in constructing Article IV, §2 was to establish a complete, straightforward and summary procedure for returning a fugitive to the demanding state; the Framers did not intend that asylum states would conduct full-blown evidentiary judicial proceedings to inquire into the merits of the charges or alibi defenses. Clarification of the fugitivity issue and the proper evidentiary standard is essential in order to avoid a diversity of requirements and procedures among the states, as well

-23-

as to correct the erroneous decision of
the Florida Supreme Court.

Respectfully submitted,

BOB MARTINEZ
GOVERNOR


ANDREA SMITH HILLYER
ASSISTANT GENERAL
COUNSEL
THE CAPITOL
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(904) 488-3494

COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Counsel for Respondent, W. PAUL THOMPSON, Post Office Drawer 608, DeFuniak Springs, Florida 32433, this 22 day of October, 1987.

Andrea Smith Hillyer
ANDREA SMITH HILLYER
Assistant General Counsel

Counsel for Petitioner

APPENDIX

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RENDITION WARRANT ISSUED BY THE
GOVERNOR OF FLORIDA ON MARCH 26,
1984.

A-113

REQUISITION WARRANT ISSUED BY THE
GOVERNOR OF ALABAMA ON MARCH 8,
1984, AND SUPPORTING DOCUMENTS
(APPLICATION FOR REQUISITION,
CERTIFICATE, INDICTMENT, WRIT OF
ARREST).

A-116

A-1

SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 24, 1987

DEAN GALLOWAY, as
sheriff of Holmes
County,

CASE NO. 67,747

DISTRICT COURT OF

Petitioner,

APPEAL, 1ST DISTRICT

NO. AZ-233

vs.

JIMMY JOSEY,

Respondent.

On consideration of the motion for
rehearing filed by attorney for petitioner,

IT IS ORDERED by the Court that said
motion be and the same is hereby denied.

OVERTON, SHAW, BARKETT, JJ., and ADKINS,
J. (Ret.), Concur McDONALD, C.J., and
EHRlich, J., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

A-2

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Cody Taylor, Clerk
Hon. N. Russell Bower, Chief Judge

Andrea Smith Hillyer, Esquire
Hon. Robert A. Butterworth
W. Paul Thompson, Esquire

SUPREME COURT OF FLORIDA

No. 67,747

DEAN GALLOWAY, as sheriff
of Holmes County, Petitioner

vs.

JIMMY JOSEY, Respondent.

[April 16, 1987]

BARKETT, J.

We have for review Josey v. Galloway,
482 So.2d 376 (Fla. 1st DCA 1985),
certified as in conflict with Brunelle
v. Norvell, 433 So.2d 19 (Fla. 4th
DCA 1983). We have jurisdiction.
Art. V, §3(b)(4), Fla. Const.

We are asked to determine the burden
of proof a respondent must bear to
overcome an existing presumption that
he is a fugitive from justice and therefore
subject to extradition. We conclude
that when a warrant is based upon a
facially valid probable cause hearing

in the foreign state, the accused may only defeat extradition as to this issue by producing clear and convincing proof that he is not a fugitive from justice.

On January 31, 1984, an Alabama grand jury returned the indictment in this case charging that:

Jimmy D. Josey, whose name is to the Grand Jury otherwise unknown, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to wit: \$1500, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.

482 So.2d at 380 (footnote omitted).

Based on these charges Alabama authorities issued a writ of arrest.

The District Attorney for the Twentieth Judicial Circuit of Alabama then filed a sworn application asking the governor of Alabama to seek Josey's extradition. In pertinent part, this petition alleged

that Josey had been charged with second-degree theft, had been present in Alabama at the time of the crime, and currently was a fugitive from justice in Florida. The governor of Alabama issued a demand for extradition to the governor of Florida, attaching copies of the indictment and the writ of arrest. Honoring this request, the governor of Florida issued a warrant.

After his arrest in Florida, Josey filed a petition for writ of habeas corpus. He challenged the allegation that he was a fugitive from justice and argued that he was present in Florida the entire day of the alleged theft.

At the hearing on Josey's petition, the state introduced the Alabama indictment and writ of arrest, the Alabama district attorney's application, and the Florida warrant, and rested its case. Josey

responded to the charges by calling seven witnesses, including himself and his wife, who testified that he was not in Alabama the day of the theft. The evidence reflected that Josey had been a sales representative for Golden Plant Food Company, a fertilizer manufacturer in Henry County, Alabama.

On his own behalf, Josey testified that he had not been in or near Headland, Alabama, site of the theft, since attending a meeting with Golden Plant Food representatives sometime between March and May 1983.

An eyewitness to the theft testified that it occurred on October 16, 1983. At that time, individuals purporting to be Golden Plant Food Company employees loaded fertilizer belonging to Don Johnson and drove away. This eyewitness said that he knew Josey and that Josey "was not one of the individuals there with the truck loading the fertilizer." Four

witnesses testified that they saw Josey in Bonifay, Florida, during various times of the day on October 16, 1983. Both Josey and his wife testified that he was in Bonifay the entire day.

After argument, the trial court denied Josey's petition for habeas corpus, finding that "there was no legal reason that would bar Alabama authorities from returning Jimmy Josey to that state to answer criminal charges named in the governor's rendition warrant." Josey obtained review in the First District Court of Appeal, which remanded for legally sufficient findings of fact:

Since the trial court did not find that appellant failed to meet his burden of proof, but stated simply that "no legal reason" existed for denying his return to Alabama, it appears the court may have denied the writ as a matter of law.

The First District below noted conflict with Brunelle based on the latter's assertion that extradition is mandatory when the accused's evidence "does no more than create a conflict" with the state's evidence. 433 So.2d at 20. Interpreting this language to mean that any evidentiary conflict requires extradition, the First District rejected the reasoning of Brunelle and found that an accused must be afforded some meaningful opportunity to defeat the presumption that he is a fugitive.

We agree with the First District's reasoning, but decline to read Brunelle so narrowly. To do so would render meaningless the guarantee of a habeas corpus hearing and the accompanying right to present evidence against the warrant under Florida's Uniform Interstate Extradition Act, sections 941.01-941.42, Florida Statutes (1985), as well as under the

decisions of the United States Supreme Court. See Michigan v. Doran, 439 U.S. 282, 288-89 (1978).

In Doran, the Court held that interstate extradition is a summary and mandatory executive proceeding and ruled that a facially valid extradition warrant issued by the governor may not be challenged solely on the basis of a purported lack of probable cause. 439 U.S. at 290. However, Doran recognized four permissible challenges:

(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Doran, 439 U.S. at 289. Only the last of these factors is pertinent to the case at bar, and the focus of our inquiry is directed to the manner by which such a challenge can be sustained.

The principles governing this issue were enunciated by the United States Supreme Court in Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 109 (1907).

One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

In McNichols, the accused contended he was in a different state on the day of the crime, but could only account for his presence there during a few hours of the afternoon. The warrant did not limit the time of the crime to the afternoon hours, and the crime occurred approximately one to one and one-half hours from the place the defendant purported to be. Based on these scant facts, the McNichols

court found that the accused had not defeated the presumption that he was a fugitive from justice.

In South Carolina v. Bailey, 289 U.S. 412 (1933), the Supreme Court again spoke on the issue, using the language later adopted by the Fourth District in Brunelle. The Court in mid-thought stated:

" . . . [T]he court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

289 U.S. at 421 (quoting Munsey v. Clough, 196 U.S. 364, 374 (1905)). In the same pen stroke, the Court echoed the language of McNichols and reaffirmed the right of a defendant to challenge the presumption that he is a fugitive from justice:

"When a person is held in custody as a fugitive from

justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

289 U.S. at 421 (emphasis added). The Bailey court then applied this principle to its case:

[W]e may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide.

289 U.S. at 421-22 (emphasis added).

The Court then rephrased the principle:

Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.

289 U.S. at 422 (emphasis added). Despite the use of somewhat inconsistent language, the Bailey court plainly held that the presumption arising from the governor's warrant can be defeated by clear and convincing evidence that the accused was not in the jurisdiction where and when the crime occurred. See also Walton v. State, 98 Idaho 442, 566 P.2d 765 (1977). As the Second District correctly observed in State v. Cox, 306 So.2d 156, 159 (Fla. 2d DCA 1974):

The question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and thereafter departed from that state.

Partly because of the language in Bailey, the Florida courts have shown considerable confusion in their approach to this issue. Under facts similar to those of the present case, the Third District

in State v. Davila, 481 So.2d 486, 492 (Fla. 3d DCA 1986) (on rehearing), held that a petitioner cannot defeat the governor's warrant if the evidence "does no more than create a conflict . . . on the question of his whereabouts (during the crime)." Earlier, that same court in State v. Scoratow, 456 So.2d 922, 923 (Fla. 3d DCA 1984), had held that the burden is on the accused to "'overthrow conclusively the presumption against him'" (quoting State ex rel. Kimbro v. Starr, 65 So.2d 67, 68 (Fla. 1953)); but the Scoratow court went on to say that "merely contradictory evidence on the issue of the accused's presence in or absence from the demanding state" will not defeat the warrant. 456 So.2d at 923. Our own prior holding in Kimbro may have added to the confusion by noting that a court's "plain duty" is to deny habeas corpus releif where the evidence

"is in direct conflict." 65 So.2d at 69. Based on our reading of Bailey and the Florida Uniform Interstate Extradition Act, we find that conflict of evidence is not the appropriate standard for testing a petitioner's challenge. The sole question is whether the petitioner has defeated the presumption of validity with clear and convincing proof he was not in the demanding jurisdiction when the crime occurred.

We next turn to a related evidentiary issue addressed by the court below. Based on its reading of pertinent case law, the First District concluded that the state cannot meet its burden of proof merely by submitting affidavits not based on first-hand knowledge. 482 So.2d at 385. This holding, while essentially correct, requires clarification. We agree with the First District that affidavits

not based on first-hand knowledge carry little evidentiary value, either in the state's or the petitioner's case. However, other than to prove that the petitioner is the same person named in the original charges, the quality of the state's proof becomes an issue only if the petitioner comes forward with clear and convincing evidence that he is not a fugitive. The burden then shifts to the state to produce competent evidence discrediting the petitioner's proof to such a degree that it ceases to be clear and convincing. While the court may receive any evidence it deems proper, affidavits and other hearsay not based on first-hand knowledge, without more, are insufficient to meet the state's burden on this issue. We hasten to note, however, that the evidentiary value of any extradition paper has no effect on the presumption that the petitioner is

a fugitive, which arises immediately upon issuance of a valid warrant.

Adhering to these core principles, the First District remanded the present action to the trial judge to weigh its evidence under the appropriate legal standard. We concur and cite with approval a pertinent analysis by the Supreme Court of Idaho:

If a petitioner presents no evidence, the presumption operates to mandate the extradition. If a petitioner does present evidence, the trial court must decide whether the petitioner has established by clear and convincing evidence that he was absent from the demanding state at the time of the offense. The state, at its option, may present evidence or not. If [the state] chooses to submit additional affidavits, the court must view all evidence presented and determine whether, on balance, the petitioner has carried his burden. . . . If, on the other hand, no evidence is presented by the state, and the court is faced with uncontroverted evidence from the defendant, it must evaluate that evidence alone to determine whether the petitioner has carried his burden by clear and convincing proof.

Walton v. State, 98 Idaho 442, 445, 566

P.2d 765, 768 (1977). Our sister court further explained that

uncontroverted evidence from the petitioner does not automatically mean that the petitioner has met this burden, for the court might disbelieve the credibility of the witnesses. If the trial court views all the evidence and determines that the presumption was not overturned, then it is not necessary for the state to go forward with evidence.

Id. at 445, 566 P.2d at 768.

We find that the Idaho court's analysis correctly states the law pertaining to this issue. The presumption and procedure outlined above are founded, on one hand, in our obligation under the constitution and its supremacy clause to ensure the integrity of the extradition process. Florida may not provide sanctuary to those fleeing justice in her sister states, thereby turning this nation's criminal justice system into a game whose outcome rests largely on whether the accused can

cross a border. See Doran, 439 U.S. at 287. On the other hand, the constitution forbids a state from exercising its extradition powers based on false accusations, simple ignorance of the law or wanton abuse of process. Every state has an equal obligation to see that no such attempt is successful and, simultaneously, that any corrective measures it takes will preserve the constitutional policy underlying extradition. Id. at 288.

Accordingly, we approve the district court's opinion and its action in remanding the matter to the trial court for further proceedings consistent herewith.

It is so ordered.

OVERTON and SHAW, JJ., and ADKINS, J.
(Ret.), Concur

MCDONALD, C.J. and EHRLICH, J., Dissent
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision
of the District Court of Appeal - Certified
Direct Conflict of Decisions

A-20

First District - Case No. AZ-233

Robert A. Butterworth, Attorney General,
and Andrea Smith Hillyer, Assistant Attorney
General, Tallahassee, Florida

for Petitioner

W. Paul Thompson, DeFuniak Springs, Florida

for Respondent

IN THE SUPREME COURT OF FLORIDA

DREW GALLOWAY, as
Sheriff of Holmes
County,

Petitioner,

vs.

CASE NO. 67,747

JIMMY JOSEY,

Respondent.

MOTION FOR REHEARING

COMES NOW, Petitioner, by and through the undersigned counsel, and hereby moves this court for rehearing in the instant matter based upon the following grounds;

1. In the opinion issued by this court, the majority wrote:

Based on our reading of Bailey and the Florida Uniform Interstate Extradition Act, we find that conflict of evidence is not the appropriate standard for testing a petitioner's challenge. The sole question is whether the petitioner has defeated the presumption of validity with clear and convincing proof he was not in the demanding jurisdiction when the crime occurred.
App., p 6 (emphasis added)

The majority then quotes with approval from a decision of the Idaho Supreme Court in Walton v. State, 566 P.2d 765 (Idaho 1977), in support of the conclusions above.

2. This court misapprehended the holding of the Idaho Supreme Court in Walton v. State, supra. In Walton, the court specifically recognized and held, pursuant to federal case law, that "when the record discloses a mere conflict in evidence, it is not enough to defeat the extradition." 566 So.2d at 768.

This Court's language in rejecting the "conflict of evidence" standard yet quoting with approval from Walton is inconsistent when the entire Walton opinion is read. Additionally, in quoting from Walton this Court omitted a very important sentence contained in parentheses in the quoted portion of the Walton opinion:

(We would note that the burden placed on the state is not an

onerous one; only slight evidence is needed to rebut the petitioner's showing. State v. Limberg, 274 Minn. 31, 142 N.W. 2d 563 (1963). This Court has previously approved the use of affidavits for this purpose. Smith v. State, supra. 566 P.2d at 768)

The above important sentences were omitted by this court despite the fact that the above explains the true intent of the Walton court.

3. Further, the majority of state courts have followed the clear dictates set forth by the federal courts in this regard. Petitioner cited the case of In Re Rowe, 423 N.E. 2d 167 (Ohio 1981), in the initial brief on the merits as stating the correct standard accepted by the majority of state courts and the federal courts. (See page 19 of Petitioner's brief). The Ohio Supreme Court's opinion in Rowe was specifically approved, as stating the correct standard, by the United

States Court of Appeals for the Sixth Circuit, in Pakulski v. Hickey, 731 F.2d 382 (6 Cir. 1984). A copy of Pakulski is attached for this court's convenience.

As stated in Pakulski (quoting from Rowe) (and quoted in Petitioner's brief) the correct standard is as follows:

We agree and conclude under the ratio decidendi of Munsey v. Clough and South Carolina v. Bailey, first, the burden is upon the petitioner to rebut the presumption created by the issuance of the Governor's warrant that the petitioner is a fugitive from justice by proof beyond a reasonable doubt. Secondly, that where there is contradictory evidence upon the issue of fugitivity and there is substantial and credible evidence placing the petitioner in the demanding state on or about the date of the offense, the petitioner has not met the burden placed upon him and the habeas corpus court may not, under the guise of passing upon the credibility of witnesses, resolve the fact of the petitioner's presence in the demanding state in favor of the petitioner and discharge him from custody. To conclude otherwise and hold the court

possesses its ordinary unlimited authority to pass upon the credibility of witnesses and resolve disputed questions of material fact would not be consonant with the summary and unique character of extradition proceedings wherein issues of guilt and innocence, including alibi, are for resolution in the courts of the demanding state.

Pakulski, 731 F.2d at 390, quoting from In Re Rowe, 423 N.E. 2d at 173-174. As explained in Petitioner's brief, the habeas court is not denied its authority to pass upon the credibility of witnesses, but the court must do so only in conformance with United States Supreme Court pronouncements.

4. The result of this Court's opinion it to turn every habeas corpus action in an extradition case into a mini-evidentiary hearing in the State of Florida, contrary to the clearly expressed constitutional design of extradition being summary and mandatory. Evidence in extra-

dition proceedings is to be construed liberally in favor of the demanding state. The constitutional provisions are thwarted by requiring the state to affirmatively produce additional evidence every time the fugitive testifies or produces evidence that he was not in the demanding state at the time of the crime. It would be extremely impractical if not impossible for the demanding state to meet the technical rules of evidence in the asylum state and carry on a full scale mini-trial with witnesses brought from the demanding state to the asylum state on such an issue as alibi. The resulting delays and consequent appeals will be substantial.

Wherefore, Petitioner respectfully requests that this court reconsider the majority opinion in light of the above and in light of the following language consistently utilized by the United States Supreme Court regarding extradition:

The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several state, -- an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful vigorous enforcement of that stipulation is vital to the harmony and welfare of the states.

Appleyard v. Massachusetts, 27 S.Ct. 122, 124 (1906).

This Court should remember that case law concerning extradition must be uniform nationwide or else certain states will become havens for fugitives and the intent of the constitutional provision will be thwarted. Courts across the United States have consistently followed the United States Supreme Court's pronouncement that merely contradictory or conflicting evidence will not defeat extradition. See South

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Carolina v. Bailey, 289 U.S. 412 (1932);

Munsey v. Clough, 196 U.S. 364 (1905).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W. Paul Thompson, Post Office Drawer 608, DeFuniak Springs, Florida 32433, this 1st day of May, 1987.

Andrea Smith Hillyer
Assistant General Counsel

A-29

Mitchell J. PAKULSKI, et al.,
Petitioners-Appellants,

v.

Donald T. HICKEY, Sheriff of Lucas
County, Ohio, et al.,
Respondents-Appellees.

No. 83-3143

United States Court of Appeals
Sixth Circuit

Argued March 8, 1984
Decided April 13, 1984

Defendants appealed from a judgment of the United States District Court for the Northern District of Ohio, Nicholas J. Walinski, J., denying federal habeas corpus relief from request for extradition. The Court of Appeals, Harry Phillips, Senior Circuit Judge, held that: (1) federal habeas corpus relief from extradition of defendants from Ohio to North Carolina was not available on ground that defendants were not fugitives where evidence on question whether defendants were in North Carolina

on the date of alleged offense was contradictory, and (2) federal habeas corpus relief from extradition of one defendant was not available on ground that second extradition request based on additional charge subjected defendant to double jeopardy and violated due process since petitioner could assert claims of prosecutorial misconduct and double jeopardy in North Carolina.

Affirmed.

1. Habeas Corpus 85.8(2)

Federal habeas corpus relief from extradition of defendants from Ohio to North Carolina was not available on ground that defendants were not fugitives where evidence on question whether defendants were in North Carolina on date of alleged offense was contradictory. U.S.C.A. Const. Art. 4, §2, cl. 2; 18 U.S.C.A. § 3182.

2. Habeas Corpus 45.3(7)

Federal habeas corpus relief from extradition of defendant from Ohio to North Carolina was not available on ground that second extradition request based on additional charge subjected defendant to double jeopardy and violated due process since petitioner could assert claims of prosecutorial misconduct and double jeopardy in North Carolina. U.S.C.A. Const. Art. 4, § 2, cl. 2; 18 U.S.C.A. § 3182.

Henry B. Herschel, Paul Davis (argued), Christopher C. Loyd, James C. Sass, Toledo, Ohio, for petitioners-appellants.

James D. Bates, Asst. Lucas County Prosecutor (argued), Toledo, Ohio, J. Michael Carpenter, Asst. Atty. Gen. of N.C. Dept. of Justice (argued), Jack L. Cozort, Raleigh, N.C., for respondents-appellees.

Before KEITH and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge.

The question in this case is whether or not the three appellants are "fugitives" from North Carolina and subject to extradition. Extradition of appellants was ordered by Ohio Governor James A. Rhodes on May 18, 1979 upon the request of North Carolina Governor James B. Hunt.

The extradition has been delayed for a protracted period of time by a writ of habeas corpus improvidently granted by the Court of Common Pleas of Luca County, Ohio, on October 2, 1979. The decision of the Common Pleas Court was reversed by the Supreme Court of Ohio in a well-reasoned opinion, In re Rowe, 67 Ohio St.2d 115, 423 N.E.2d 167 (1981). The appellants also filed a petition for a writ of habeas corpus in the United States

District Court for the Northern District of Ohio, Western Division.

The appellants are Mitchell Pakulski, Elliot Rowe and Donna Rowe, who appeal from the judgment of the district court dismissing their petitions for a writ of habeas corpus. We affirm. Following oral argument on March 8, 1984, this Court, from the bench on its own motion, terminated the order staying the extradition pending this appeal, entered by the district court on February 24, 1983.

I

The Supreme Court of Ohio summarized the facts as follows:

On September 17, 1978, the body of Willard Setzer, who had been shot, was discovered in Waynesville, Haywood County, North Carolina. On November 27, 1978, Elliot Rowe III and Mitchell John Pakulski, appellees herein, were charged in the General Court

of Justice, Superior Court Division of Haywood County, with the offense of murder in the first degree, committed on or about September 17, 1978, which is a capital offense prescribed by General Statutes Section 14-17 of North Carolina. Arrest warrants were issued by the magistrate of the District Court Division of the court. On December 6, 1978, Donna Rowe, also an appellee herein, was similarly charged and an arrest warrant issued.

Appellees were thereafter arrested in Lucas County, Ohio, upon fugitive warrants issued by the Court of Common Pleas of Lucas County pursuant to R.C. 2963.11. On December 6, 1978, James B. Hunt, Jr., Governor of the state of North Carolina, formally requested of James A. Rhodes, Governor

of the state of Ohio, the arrest and extradition of Elliot Rowe and Mitchell John Pakulski as fugitives from justice, followed, on December 13, 1978, with a similar request for the extradition of Donna Rowe.

On May 18, 1979, Governor Rhodes granted extradition by the issuance of an arrest warrant for appellees, which warrants were executed by the Sheriff of Lucas County. Thereafter, each appellee filed a complaint for a writ of habeas corpus, pursuant to R.C. 2963.09, to contest the legality of their arrest. The respondent, the Sheriff of Lucas County, filed a "return" to the complaint averring, *inter alia*, that appellees were being held pursuant to a warrant of arrest issued by the Governor of the state of Ohio.

The complaints were joined for hearing and evidence presented. Essentially, by their complaint averments and evidence appellees asserted they were not fugitives from justice within the meaning of that term as used in the federal Constitution and federal and state extradition statutes, for the reason they were not in the demanding state of North Carolina on or about the date the offense charged was committed. By oral pronouncement on September 7, 1979, followed on October 2, 1979, by judgment entry, the court granted the writ of habeas corpus and discharged appellees from custody. In its judgment entry, the court *inter alia*, found beyond a reasonable doubt that appellees "were not in the state

of North Carolina on the date of the alleged offense."

67 Ohio St.2d at 115-117.

In addition to the true bills of indictment for first degree murder against the three appellants previously returned by the Haywood County, North Carolina grand jury, the grand jury also returned an indictment on November 6, 1979 charging Pakulski with forgery and uttering certain checks in August 1978 prior to the Setzer murder. On November 5, 1980 Ohio's Governor Rhodes, at the request of North Carolina's Governor Hunt, granted extradition of Pakulski on these charges.

Pakulski filed a second petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio, Western Division. This petition is discussed in Part VII of this opinion. The District Court granted a

stay order on November 20, 1980, staying all proceedings in the Common Pleas Court of Lucas County regarding the extradition of Pakulski on the charge of forging and uttering. The State of Ohio filed a timely motion to dismiss the petition for habeas corpus and dissolve the stay order. The District Court granted the motion to dismiss the petition and dissolve the stay order in a memorandum opinion and order dated February 24, 1983.

The proceeding involving the charges against Pakulski for forging and uttering was consolidated by the District Court with the original habeas corpus proceeding involving the extradition of all three appellants on the charge of murder. The present appeal seeks reversal of the judgments of the District Court in dismissing both petitions for writs of habeas corpus.

On December 3, 1979 Pakulski was charged by a United States Grand Jury for the

Western District of North Carolina with the interstate transportation of the stolen motor vehicle owned by the murder victim, Willard Setzer, and with the theft of checks stolen from the United States mail.

The United States Attorney for the Western District of North Carolina agreed, pursuant to Rule 20, Fed.R.Cr.P., to a transfer of these federal charges. Pakulski entered an Alford plea of guilty on March 28, 1980 before District Judge Nicholas J. Walinski, who placed him on probation for a period of three years.

II

Interstate extradition finds its source in the Constitution of the United States, and long has enabled a State to bring alleged offenders to trial in the jurisdiction where a crime took place.

Clause 2 of Section 2, Article IV of the Constitution of the United States provides:

Section 2, Clause 2. Extradition

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The Supreme Court has held that the design of this Constitutional provision "was, and is, to eliminate for this purpose the boundaries of the States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land." Biddinger v. Commissioner of Police, 245 U.S. 128, 133, 38 S.Ct. 41, 43, 62 L.Ed. 193 (1917).

Congress first implemented this constitutional provision in 1793. 1 Stat. 302.

This principle is codified at 18 U.S.C.

§3182, which provides as follows:

§ 3182. Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such

person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

In Michigan v. Doran, 439 U.S. 282, 287, 288-89, 99 S.Ct. 530, 534, 535, 58 L.Ed.2d 521, the Supreme Court stated:

The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. Biddinger v. Commissioner of Police, 245 U.S. 128, 132-133 [38 S.Ct. 41, 42-43, 62 L.Ed. 193] (1917); Appleyard v. Massachusetts,

203 U.S. 222, 227 [27 S.Ct. 122,
123-24, 51 L.Ed. 161] (1906).

The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus "balkanize" the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity. Compare Biddinger, supra, with McLeod v. Dilworth Co., 322 U.S. 327, 330 [64 S.Ct. 1023, 1025-26, 88 L.Ed. 1304] (1944). In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines

for certain purposes, without impinging on essential state autonomy.

Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution. Biddinger, supra, at 132; In re Strauss, 197 U.S. 324, 332 [25 S.Ct. 535, 537, 49 L.Ed. 774](1905); R. Hurd, A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus 598 (1858). The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

Near the turn of the century this Court, after acknowledging the possibility that persons may give false information to the police or prosecutors and that a prosecuting attorney may act "either wantonly or ignorantly," concluded:

"While courts will always endeavor to see that no such attempted wrong is successful, on the other hand, care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt." In re Strauss, supra, at 332-333 [25 S.Ct. at 537].

Whatever the scope of discretion vested in the governor of an asylum state, cf. Kentucky v. Dennison, 24 How. 66, 107 [16 L.Ed. 717](1861), the courts of an asylum state are bound by Art. IV, § 2, cf. Compton v. Alabama, 214 U.S. 1, 8 [29 S.Ct. 605, 607, 53 L.Ed. 885](1909), by § 3182, and, where adopted, by the

Uniform Criminal Extradition Act.

A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. Bassing v. Cady, 208 U.S. 386, 392 [28 S.Ct. 392, 393-94, 52 L.Ed. 540](1908).

Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

Michigan v. Doran was quoted and applied by the Supreme Court of Ohio in

In re Rowe, supra, 67 Ohio St.2d at 118-119, 423 N.E.2d 167, and by this Court in its recent opinion in Camberlain v. Celeste, 729 F.2d 1071 (6th Cir. 1983).

Ohio has enacted the Uniform Criminal Extradition Act, R.C. 2963.02. The Supreme Court of Ohio began it's opinion In re Rowe, supra, with this language:

We need not pause in this appeal for a threshold inquiry as to whether federal or state law is controlling with respect to the matter before us. It is definitively and conclusively settled that when interstate extradition is sought upon the basis that one has committed an offense in the demanding state and fled therefrom to an asylum state, federal law, both constitutional and statutory, in so far as it is applicable, is controlling. South Carolina v. Bailey,

(1933), 289 U.S. 412 [53 S.Ct. 667, 77 L.Ed. 1292]; Innes v. Tobin (1916), 240 U.S. 127 [36 S.Ct. 290, 60 L.Ed. 562]; Kentucky v. Dennison, (1860), 65 U.S. 66 [16 L.Ed. 717]; Prigg v. Pennsylvania (1842), 41 U.S. 539 [10 L.Ed. 1060]. Further, it is the duty of state courts to administer the federal law as construed by the United States Supreme Court. South Carolina v. Bailey, supra.

The controlling nature of federal law with respect to interstate extradition was recognized by this court in Ex parte Ammons (1878), 34 Ohio St. 518.

The Uniform Criminal Extradition Act (11 Uniform Laws Anno. 51) was adopted by the General Assembly in 1937. 117 Ohio Laws 588. In obvious recognition of the supremacy of federal

law, it was provided in R.C. 2963.02 as follows:

"Subject to section 2963.01 to 2963.27, inclusive, of the Revised Code, the constitution of the United States and all acts of congress enacted in pursuance thereof, the governor shall have arrested and delivered to the executive authority of any other state of the United States, any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in the state." 67 Ohio St.2d at 117, 423 N.E.2d 167.

III

Appellants sought to avoid extradition by undertaking to prove that they are not "fugitives" -- that they were in Ohio at the time of the North Carolina murder with which they are charged.

The Supreme Court of Ohio stated

In re Rowe:

The right to raise such issue of fugitivity in a habeas corpus proceeding in the asylum state is always open to the accused, to be determined as a question of fact, as a federal constitutional right. Michigan v. Doran, supra; Hyatt v. People, ex rel. Corkran (1903), 188 U.S. 691 [23 S.Ct. 456, 47 L.Ed. 657]; Roberts v. Reilly [116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544], surpa. The right to file a writ of habeas corpus is also provided in R.C. 2963.09 (Section 10 of the Uniform Criminal Extradition Act.) This court has held that fugitivity is a proper issue for consideration both by the Governor and the habeas corpus court. In re Harris (1959), 170 Ohio St. 151 [163 N.E.2d 762].

It is a fundamental proposition from which there is no dissent that guilt or innocence with respect to the criminal charges is not a proper area of inquiry either by the Governor of the asylum state or the habeas corpus court. The Ohio General Assembly has by positive enactment prohibited such inquiry "except as it may be involved in identifying the person held as the person charged with the crime". R.C. 2961.18 (Section 20 of the Uniform Criminal Extradition Act). Such rule, however, does not foreclose inquiry into the fugitivity defense if raised and evidence, if probative of the fact that accused is not a fugitive even though it may also incidentally tend to prove an alibi defense, is admissible.

See State, ex rel. Davey v. Owen (1937), 133 Ohio St. 96 [12 N.E.2d 144].

The issuance of the Governor's warrant herein, pursuant to R.C. 2963.07, raised a presumption that appellees were in lawful custody and the burden to overcome such **prima facie** case in favor of North Carolina by sufficient proof rested upon appellees. Michigan v. Doran, supra (439 U.S. 282 [99 S.Ct. 530, 58 L.Ed.2d 521]); South Carolina v. Bailey, supra (289 U.S. 412 [53 S.Ct. 667, 77 L.Ed. 1292])).

To rebut the presumption of the lawfulness of their arrests under the Governor's warrant, appellees called 14 witnesses whose testimony, in combination, placed appellees in Toledo, Ohio, in the September 14,

1978 time period. The witnesses were primarily, but not wholly, friends, relatives, and acquaintances of appellees. 67 Ohio St.2d at 120, 423 N.E.2d 167.

The States of Ohio and North Carolina introduced two witnesses who testified unequivocally that they saw appellants in North Carolina shortly preceding the murder of the decedent. The Supreme Court of Ohio summarized the testimony of these two witnesses in 67 Ohio St.2d at 121, footnote 2, 423 N.E.2d 167. The district court summarized their testimony as follows:

Mr. Thomas Beck, a police officer from Waynesville, North Carolina, testified that he had been on routine patrol from 6:00 p.m. to 2:00 a.m. on the evening of September 15, 1978 (Tr. 11). He was working with officer Daniel Logan (Tr. 11). Mr. Beck

was making routine rounds of the bars in Waynesville that evening to check for underage drinkers (Tr. 12-13). He testified that he saw Donna Rowe at approximately 8:00 or 8:15 in a bar known as the Casa Grande Club in the town of Waynesville and that she was accompanied by a woman he identified as Marion Rupe (Tr. 14). He had a conversation with Marion Rupe regarding her age and the consumption of alcohol (Tr. 16).

He later returned to the Casa Grande Club between 11:30 p.m. and 11:45 p.m. where he again observed Donna Rowe enter the bar with a man he identified as Mitch Pakulski (Tr. 18-19). He testified that he could not describe Donna Rowe's attire at 8:00 p.m. but that later in the

evening he remembered that she wore blue jeans, a light-colored blouse and knee-high boots. He further indicated that each of the petitioners was wearing a black riding hat with a red feather in it. (Tr. 18-19).

The State next called Marion Rupe, age 17, a resident of Waynesville, North Carolina, to the stand. She stated that Donna Rowe and Elliot Rowe are her first cousins (Tr. 3-4). She saw them on September 15, 1978 at the trailer home of her sister, Frankie Rupe, in Waynesville at approximately 4:30 p.m. They discussed arrangements to go to the Casa Grande Club that evening to celebrate the witness's seventeenth (17th) birthday. Both Donna and Frankie agreed to go only after Marion provided them with pants to wear. (Tr. 7-8).

That evening Marion's brother Clyde and Elliot Rowe drove her to the Casa Grande Club where she arrived at about 7:10 p.m. Elliot Rowe never entered the bar and Marion never saw him again the rest of the evening (Tr. 9).

Donna Rowe and Frankie Rupe arrived at the case Grande at about 7:30 p.m. (Tr. 10). Marion described Donna's attire as consisting of Wrangler jeans, a red top with no sleeves, and a black hat with a red feather in it. The cuffs of Donna's jeans were tucked inside her knee-high boots (Tr. 10). Marion testified that she remembered speaking to a police officer that evening regarding underage alcohol consumption but she did not know the officer's name (Tr. 11-13).

Marion stated that Mitch Pakulski entered the club at about 8:15 p.m. (Tr. 14). He was wearing blue jeans, a Wrangler jacket and a black hat with a red feather in it. The cuffs of his pants were tucked in the top of his boots (Tr. 15). Donna came back in after about 15 minutes but Marion didn't see Pakulski the rest of the evening (Tr. 17). Marion left the bar at about 11:15 to go home (Tr. 17). Donna Rowe returned to the trailer at about 2:00 a.m. (Tr. 19).

The next day, September 16, 1978, Marion saw Donna Rowe, Mitch Pakulski and Elliott Rowe when they drove up to her house in the company of a male stranger who she didn't know at about 1:15 p.m. (Tr. 20). After a short conversation they left her

home and she did not see them the rest of the day (Tr. 20-22).

IV

The general purpose of extradition law was defined by the Supreme Court in Appleyard v. Massachusetts, 203 U.S. 222, 227-228, 27 S.Ct. 122, 124, 51 L.Ed. 161 (1906), as follows:

The constitutional provision that a person charged with crime against the laws of a State and who flees from its justice must be delivered up on proper demand, is sufficiently comprehensive to embrace any offense, whatever its nature, which the State, consistently with the Constitution and laws of the United States, may have made a crime against its laws. Kentucky v. Dennison, 24 How. 66, 69 [16 L.Ed. 717]; Ex parte Reggel, 114 U.S. 642, 650 [5 S.Ct. 1148, 1152-53, 29 L.Ed. 650]. So that

the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he **consciously** fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding State. A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State -- no matter for what purpose or with what motive, nor under what belief -- becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State

whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States -- an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is

vital to the harmony and welfare of the States. And while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State.

South Carolina v. Bailey, 289 U.S. 412, 53 S.Ct. 667, 77 L.Ed. 1292 (1933) involved an extradition proceeding in which the alleged fugitive claimed to have been absent from the demanding state when the murder was committed and consequently that he was not a fugitive from justice. A state court of the asylum

state, after hearing the testimony of thirty or more witnesses and considering a number of affidavits, concluded that the petitioner was not a fugitive and ordered his release from custody. The Supreme Court of the asylum state affirmed. The United States Supreme Court reversed on the ground that there was a conflict of evidence on the issue of fugitivity. This decision held that a person who has been arrested in one state as a fugitive from justice, and who seeks discharge by habeas corpus upon the ground that he was not in the demanding state at the time of the alleged crime, has the burden of proving the alibi beyond a reasonable doubt; and, if the evidence is conflicting, he should not be released. 289 U.S. at 422, 53 S.Ct. at 671.

In Munsey v. Clough, 196 U.S. 364, 375, 25 S.Ct. 282, 285, 49 L.Ed. 515 (1905),

the Supreme Court wrote: "[T]he Court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

In Pettibone v. Nichols, 203 U.S. 192, 206, 27 S.Ct. 111, 115, 51 L.Ed. 148 (1906), the Court, speaking through Justice John Marshall Harlan, stated: "The constitutional and statutory provisions referred to were based upon the theory that, as between the States, the proper place for the inquiry into the question of the guilt or innocence of an alleged fugitive from justice is in the courts of the State where the offense is charged to have been committed."

Numerous decisions from the United States Courts of Appeals are to the same effect. For example, in United States v. Flood, 374 F.2d 554 (2nd Cir. 1967), the Second Circuit was presented with a petition for writ of habeas corpus by a person the State of Florida sought to extradite from New York on a Florida murder charge. Petitioner and a number of his friends and relatives testified at a habeas corpus hearing in a New York court that he was in New York on the date of the murder. Florida presented the testimony of a police officer and one other witness that the petitioner was seen in Dade County, Florida, on the date of the crime. The New York trial court dismissed the petition and the Appellate Division of the New York Supreme Court affirmed. A federal writ of habeas corpus was denied by the United States District Court. In affirming

the denial of the writ, the Second Circuit stated:

There is no merit to the petitioner's contention that the burden of proof placed upon him was too heavy. It was settled long ago that the burden of proving that the accused was not present in the demanding state at the time the crime was committed rests upon him and that, to meet it, he must conclusively establish his absence by clear and convincing proof. State of South Carolina v. Bailey, supra, 289 U.S. at 421, 53 S.Ct. 667 [671]; People of State of Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 112, 28 S.Ct. 58 [62], 51 L.Ed. 121 (1907); Munsey v. Clough, supra. In the present case there was conflicting evidence, and so long as there was sufficient

state's evidence to support the court's finding of probable cause its conclusions must stand and New York is obligated to surrender the petitioner to Florida for trial. Hyatt v. People of State of New York ex rel. Corkran, supra, 188 U.S. at 710-711, 23 S.Ct. 456 [458-59], 47 L.Ed. 657; Moncrief v. Anderson, supra, 342 F.2d at 904. 374 F.2d at 558.

In Smith v. Idaho, 373 F.2d 149 (9th Cir.) cert. denied 388 U.S. 919, 87 S.Ct. 2139, 18 L.Ed.2d 1364 (1967), the Court of Appeals for the Ninth Circuit ruled that mere conflicts in the evidence relating to fugitivity do not provide a basis for denying extradition.

Courts of a number of states have enunciated principles similar to the federal cases just recited. See, e.g., People ex rel Dragon v. Trombley, 79 A.D.2d 768,

435 N.Y. S.2d 60 (1980); Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979); People v. Swisher 60 Ill.App.3d 452, 17 Ill.Dec. 651, 376 N.E.2d 797 (1978); Clark v. Warden, 39 Md.App. 305, 385 A.2d 816 (1978); Walton v. Idaho, 98 Idaho 442, 566 P.2d 765 (1977); Reeves v. State ex rel Thompson, 199 Tenn. 598, 288 S.W.2d 451 (1956); and Ex Parte Rabinwitz, 61 Okl.Cr. 83, 65 P.2d 1236 (1937).

V

[1] With respect to the appellants in the present appeal, the Supreme Court of Ohio reversed the judgment of the Court of Common Pleas and remanded custody of appellants to the Sheriff of Lucas County for surrender to the proper agents of the State of North Carolina, stating:

We agree and conclude under the ratio decidendi of Munsey v. Clough and South Carolina v. Bailey, first,

the burden is upon the petitioner to rebut the presumption created by the issuance of the Governor's warrant that the petitioner is a fugitive from justice by proof beyond a reasonable doubt. Secondly, that where there is contradictory evidence upon the issue of fugitivity and there is substantial and credible evidence placing the petitioner in the demanding state on or about the date of the offense, the petitioner has not met the burden placed upon him and the habeas corpus court may not, under the guise of passing upon the credibility of witnesses, resolve the fact of the petitioner's presence in the demanding state in favor of the petitioner and discharge him from custody. To conclude otherwise and hold the court possesses its

ordinary unlimited authority to pass upon the credibility of witnesses and resolve disputed questions of material fact would not be consonant with the summary and unique character of extradition proceedings wherein issues of guilt and innocence, including alibi, are for resolution in the courts of the demanding state.

67 Ohio St.2d at 123-124, 423 N.E.2d 167.

In dismissing the petition for writ of habeas corpus filed by the three appellants, District Judge Nicholas J. Walinski stated:

This Court finds that the Ohio Supreme Court's determination is "fairly supported by the record." Summer v. Mata, 449 U.S. 539 [101 S.Ct. 764, 66 L.Ed.2d 722] (1981).

The state of North Carolina presented

credible evidence which is in conflict with the evidence presented by the petitioners as to their presence in North Carolina at the time of the alleged homicide. Such being the case, the credible evidence being in conflict, the petitioners have failed to sustain their burden on the issue of proving beyond a reasonable doubt their absence from the state of North Carolina at the time of the alleged homicide.

This Court concludes that the foregoing decision of the district court is correct. Appellants will have an opportunity at their trial and North Carolina to introduce any available evidence to support their alibi that they were in Ohio at the time the alleged murder was committed.

VI

[2] As pointed out in Part I of this opinion, appellant Pakulski individually

filed a second petition for writ of habeas corpus resisting the extradition order by Ohio's Governor Rhodes with respect to his indictment for forging and uttering stolen checks. Pakulski charged that the second extradition request by North Carolina subjected him to double jeopardy and that North Carolina's repeated attempts to extradite him violated due process.

The district court dismissed this petition for habeas corpus and dissolved its stay order previously issued which restrained proceedings in the Court of Common Pleas of Lucas County on authority of Summer v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), Michigan v. Doran, supra, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978) and Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

District Judge Walinski correctly stated:

The Court finds that federal intervention at this time to resolve the petitioner's claims would be premature. The petitioner may assert any claims of prosecutorial improper conduct and double jeopardy in the state courts of North Carolina and, if appropriate and necessary, he may seek habeas corpus remedies in the federal courts.

We agree with the conclusion of the district court.

The judgments of the district court dismissing the petitioner for writs of habeas corpus are affirmed.

A-73

IN THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT,
STATE OF FLORIDA

JIMMY JOSEY,
Appellant,

vs.

NOT FINAL UNTIL TIME
EXPIRES TO FILE MOTION
FOR REHEARING AND
DISPOSITION THEREOF
IF FILED

DREW GALLOWAY,
as sheriff of
Holmes County,

CASE NO. AZ-233

Appellee.

Opinion filed September 26, 1985.

Appeal from the circuit court of Holmes
County, Warren H. Edwards, Judge.

W. Paul Thompson, DeFuniak Springs, for
Appellant.

Gregory C. Smith and Andrea Smith Hillyer,
Assistant Attorneys General, Tallahassee,
for Appellee.

ZEHMER, J.

Jimmy Josey appeals an order denying
his petition for writ of habeas corpus
and directing his return to the custody
of the state of Alabama pursuant to properly
issued extradition papers. The issue

presented is whether Josey met his burden of overcoming the presumption of fugitiveness arising from the governor of Florida's warrant of arrest and whether the appellee produced corroborating evidence of fugitiveness sufficient to create a conflict in the evidence requiring denial of habeas corpus relief as a matter of law. We reverse and remand for further proceedings.

Appellant filed in the Circuit Court of Holmes County a petition for writ of habeas corpus alleging he was improperly being held in jail in the state of Florida by the appellee sheriff, that he had not been properly charged with any crime, and that he was in the state of Florida at all times on the date the crime charged in Alabama allegedly occurred. On February 9, 1984, the District Attorney for the Twentieth Judicial Circuit of Alabama filed a sworn application for extradition

with the governor of Alabama alleging that Josey had been charged in the Henry County Circuit Court with the offense of second-degree theft, as shown by attached copies of an indictment and writ of arrest. The district attorney's application stated that the crime was committed on October 16, 1983, in the City of Headland, County of Henry, Alabama, and that Josey was present in the state of Alabama at the time of the commission of the crime and was a fugitive from justice in the state of Florida, in or near Bonifay. The indictment attached to the application for extradition charged in its entirety that:

Jimmy D. Josey, whose name is to the Grand Jury otherwise unknown, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to wit: \$1500, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.¹

The indictment had been returned by the Alabama grand jury on January 31, 1984, and the writ of arrest issued by the state of Alabama on that same date. On March 8, 1984, the governor of Alabama issued a demand for extradition upon the governor of Florida representing that Josey had been charged by indictment with the crime of second-degree theft in Alabama, that Josey was personally present in Alabama at the time of the alleged offense, and that Josey had fled from Alabama and taken refuge in Florida. Certified copies of the indictment and the writ of arrest were attached to the demand. On March 26, 1984, a warrant of arrest was executed by the governor of Florida commanding the sheriff of Holmes County to arrest Jimmy Josey. There is no mention of the record of the date Josey was arrested by the sheriff.

On April 17, 1984, a hearing was held on Josey's petition for writ of habeas corpus. The state, on behalf of the sheriff, introduced the extradition documents in evidence and rested its case. These documents consisted of the district attorney's sworn application for extradition, the indictment, the writ of arrest, the demand from the governor of Alabama, and the warrant of arrest executed by the governor of Florida.

Appellant then introduced the testimony of seven witnesses, including himself and his wife, which, if believed, proved that appellant was not in Alabama on the alleged date. The evidence revealed that appellant, between March and May 1983, was a sales representative for Golden Plant Food Company, a business that manufactured fertilizer in Henry County, Alabama. Sometime between March and May 1983 appellant

was in the vicinity of Headland attending a meeting with representatives of Golden Plant Food Company. According to petitioner, that is the last time he was in or near Headland. The testimony of an eyewitness reveals that the alleged theft occurred on October 16, 1983, when certain individuals purporting to be representatives of Golden Plant Food Company loaded fertilizer owned by Don Johnson onto a truck and drove away. This eyewitness testified that he knew Jimmy Josey and that Mr. Josey "was not one of the individuals there with the truck loading the fertilizer" (R. 37). Four witnesses testifying for appellant, three of whom were unrelated to Josey, stated they saw him in Bonifay during various parts of the day on October 16, 1983. This testimony accounted for petitioner's presence between 8:30 a.m. and 5:30 p.m. Petitioner and his wife

testified that petitioner was in Bonifay during all hours of October 16.

At the close of Josey's case, counsel for Josey argued that he had presented competent, uncontradicted evidence that Josey was not in Alabama at the time of the alleged offense and that the petition for writ of habeas corpus should be granted. The state argued that Mr. Josey's evidence was not persuasive enough to overcome the presumption arising out of the extradition documents and carry his burden of proving that he was not in Alabama on the date of the crime. The state also relied on the district attorney's application as sworn proof that Josey was present in Alabama. Josey's attorney noted the district attorney's lack of personal knowledge of Josey's presence in the state. The court requested legal memoranda and took the petition under advisement. On

May 4, 1984, the court denied the petition for writ of habeas corpus, concluding "there is no legal reason that would bar Alabama authorities from returning Jimmy Josey to that state to answer criminal charges named in the governor's rendition warrant." Josey has appealed this final order.

The power to extradite fugitives from justice derives directly from Article IV, Section 2, United States Constitution, and its implementing federal statute, 18 U.S.C.A. § 3182. Roberts v. Reilly, 116 U.S. 80, 94, 29 L.Ed. 544, 6 S.Ct. 291 (1885). To implement this federal law, the state of Florida has adopted the Uniform Interstate Extradition Act. Ch. 941, pt. 1, Fla. Stat. (1983). Section 941.02 directs the governor of Florida "to have arrested and delivered up" to another state "any person charged in that

state with treason, felony, or other crime, who has fled from justice and is found in this state."

The power of the judiciary to issue writs of habeas corpus from English law and Article I, Section 9 of the United States Constitution, Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963), and Article V, Section 5(b) of the Florida Constitution. It is a state court's duty in habeas corpus proceedings challenging extradition to administer the federal law prescribed by Article IV, Section 2, United States Constitution, and 18 U.S.C.A. § 3182, as construed by the United States Supreme Court. South Carolina v. Bailey, 289 U.S. 412, 419-20, 77 L.Ed. 1292, 53 S.Ct. 667 (1933). A habeas corpus proceeding challenging extradition involves a "federal question" of whether the accused is a fugitive from

justice, and such question is controlled by the federal constitution and laws as interpreted by the United States Supreme Court. Id.,; State v. Shelton, 8 So.2d 216, 218 (Ala. 1942).

Interstate extradition is intended to be a summary and mandatory executive proceeding designed to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged crime was committed. Michigan v. Doran, 439 U.S. 282, 287-88, 58 L.Ed.2d 521, 99 S.Ct. 530 (1978). Section 3182 requires that the governor of the demanding state deliver to the governor of the asylum state a demand for extradition and an indictment found or affidavit made before a magistrate of the demanding state charging the accused with commission of a crime in the demanding state. See § 941.03, Fla. Stat. (1983). ² The governor of the asylum state must then determine,

as a matter of law, whether the accused has been substantially charged with a crime in the demanding state and whether, as a matter of fact, upon such evidence as is satisfactory to him, the accused is a fugitive from justice. Munsey v. Clough, 196 U.S. 364, 372, 49 L.Ed. 515, 25 S.Ct. 282 (1905). If the governor determines that extradition is proper, he issues a warrant of arrest directing the appropriate law enforcement officers of his state to arrest the accused. 18 U.S.C.A. § 3182; § 941.07, Fla. Stat. (1983); Marbles v. Creecy, 215 U.S. 63, 67, 54 L.Ed. 92, 30 S.Ct. 32 (1909).

Once arrested and held as a fugitive from justice, the accused has a federal constitutional right to question the lawfulness of his arrest and custodial imprisonment by petitioning the circuit court for a writ of habeas corpus and showing

upon competent evidence that he was not a fugitive from justice of the demanding state. Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 109, 52 L.Ed. 121, 28 S.Ct. 58 (1907); Roberts v. Reilly, 116 U.S. 80, 94-95; Crumley v. Snead, 620 F.2d 481, 483 (5th Cir. 1980). See section 941.10, Florida Statutes (1983). To be a fugitive from justice within the meaning of Article IV, Section 2, United States Constitution, and 18 U.S.C.A. §3182, it is necessary that the accused have been in the demanding state when the crime was committed and that he thereafter fled that state and was found in another state. Appleyard v. Massachusetts, 203 U.S. 222, 231-32, 51 L.Ed. 161, 27 S.Ct. 122 (1906). This is also true in the case of a proceeding under section 941.03, Florida Statutes (1983). In a habeas corpus proceeding challenging the governor's determination

that extradition is proper, the warrant of arrest is prima facie proof that petitioner is a fugitive from justice and may be overcome only by contrary proof presented by the petitioner. Illinois v. Pease, 207 U.S. at 109. In order to overcome the presumption of fugitiveness arising from the governor's warrant of arrest, the petitioner must present clear and satisfactory evidence establishing beyond any reasonable doubt that he was not in the demanding state on the date of the alleged offense. South Carolina v. Bailey, 289 U.S. at 421-22. The issue of fugitiveness is one of fact to be determined by the trial judge upon all the evidence. Michigan v. Doran 439 U.S. at 289. If competent evidence on the issue of fugitiveness is contradictory, the petitioner will be denied discharge on writ of habeas corpus as a matter of

law. Munsey v. Clough, 196 U.S. at 375.
South Carolina v. Bailey, 289 U.S. at
421.

In the present case the state properly introduced the Florida warrant of arrest which established a prima facie showing that appellant was a fugitive from justice. State v. McCreary, 165 So. 904 (Fla. 1936). Appellant then introduced contrary evidence proving, if believed, that he was not in Alabama on the date of the offense and was not a fugitive from justice. It was the trial court's duty at this point to evaluate the competent evidence presented by the state and appellant and determine whether there was conflicting evidence on the issue of fugitiveness. If the court found such a conflict in the evidence, it would have been required to deny appellant's petition for writ of habeas corpus as a matter of law.³

Munsey v. Clough, 196 U.S. at 375. If, however, the court had determined there was no competent evidence in the record conflicting with appellant's evidence, then it would have been the trial court's duty to judge the credibility and persuasiveness of appellant's witnesses and determine whether appellant proved by clear and satisfactory evidence beyond a reasonable doubt that he was not in Alabama on the date of the offense. South Carolina v. Bailey, 289 U.S. at 421-22. Since the trial court did not find that appellant failed to meet his burden of proof, but stated simply that "no legal reason" existed for denying his return to Alabama, it appears the court may have denied the writ as a matter of law. It is therefore necessary for us to examine the documents introduced by the state to determine whether they contain competent

evidence of fugitiveness sufficient to create an evidentiary conflict requiring denial of habeas corpus as a matter of law.

Intitially, the state introduced the demand for extradition from Alabama which alleged that appellant was in Alabama on the date of the offense. Although it was only necessary that the state introduce the Florida warrant of arrest to establish its prima facie case, State v. McCreary, 165 So. at 906, a valid demand for extradition from Alabama is a necessary predicate to the jurisdictional validity of that warrant of arrest. Section 941.03, Florida Statutes (1981), requires that the governor of Florida have before him a valid demand for extradition from a foreign state before issuing a warrant of arrest. Undeniably, one of the grounds upon which a prisoner may attack the valid-

ity of extradition is by showing that the warrant of arrest is invalid because it is not properly based on the required statutory documents. State v. McCreary, 165 So. at 906. The state may rely upon the demand for extradition to prove the jurisdictional validity of the warrant of arrest, but even assuming the arrest warrant is valid, the prisoner also has a right to attack, in a habeas corpus proceeding, the governor's factual determination that he was in the demanding state on the date of the alleged offense. If the demand for extradition from a foreign jurisdiction, which is a statutorily required document, is treated as sufficient evidence of fugitiveness to create an evidentiary conflict requiring denial of habeas corpus as a matter of law, the state need never adduce more proof than the demand and appellant's constitutional right to challenge

the governor's factual conclusion of fugitiveness in the warrant of arrest by presenting evidence of his presence elsewhere amounts to little more than a sham. We note that the United States and Florida supreme courts have clearly recognized that not only does a petitioner such as appellant have the right to challenge the jurisdictional validity of the warrant of arrest, i.e., that it is not based upon the required statutory documents, but the petitioner also has the right--even assuming the warrant of arrest and underlying documents are proper--to challenge the factual determination of fugitiveness. In order to give substance to this fundamental constitutional right, we hold that the demand for extradition required by section 941.03 cannot, standing alone, be deemed competent evidence to create a conflict on the factual issue of fugitiveness.

The Second District Court of Appeal has held that a prisoner challenging extradition who presented evidence showing he was not in the demanding state at the time of the alleged offense was entitled to habeas corpus relief when the state failed to offer any "testimony" to refute the prisoner's evidence. Trice v. Blackburn, 153 So.2d 32 (Fla. 2d DCA 1963). The court so held even though the foreign executive's demand and an indictment of the prisoner were introduced by the state and alleged the prisoner's presence in the demanding state at the time of the offense (unlike the indictment in the instant case). We agree with the rationale of the Blackburn decision. We note, however, that the fourth district's decision in Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983), appears to suggest that a foreign executive's demand is, standing

alone, sufficient competent evidence to create a conflict in the evidence requiring denial of habeas corpus relief. This reading of Brunelle, if correct, is not consistent with the fundamental right of a prisoner to challenge the factual issue of fugitiveness in a habeas corpus proceeding. Since the facts in Brunelle were not fully stated in the opinion, we cannot be certain that our reading of the decision was the intended holding of the court; however, the opinion on its face appears to conflict with our holding in this case, and we so certify such conflict to the Supreme Court.

The second evidentiary document relied on by the state is the indictment of appellant by the Henry County grand jury. This document is not competent evidence of fugitiveness for several reasons. First, it does not allege that appellant

was present in Alabama on the date of the alleged offense. It does not, in fact, even allege the date of the offense. Second, as with the demand for extradition, the indictment is required by statute as a jurisdictional prerequisite to the valid issuance of an arrest warrant. To consider it competent, and therefore conclusive, evidence of fugitiveness would render meaningless appellant's right to challenge the governor of Florida's factual determination that appellant was in Alabama at the time of the offense. Third, in Blackburn the court held that the prisoner was entitled to habeas corpus relief upon proof that he was not a fugitive even though the demanding state's indictment was in evidence, thereby indicating that an indictment, standing alone, is not sufficient to create an evidentiary conflict on the issue of fugitiveness.

Finally, the state relies on the sworn application for extradition made by the Alabama district attorney as creating an evidentiary conflict. This application contains an allegation that petitioner was in Alabama at the time of the alleged offense. It does not appear, however, that this allegation is based upon the personal knowledge of the district attorney; presumably, it is based upon his investigation of the case and is pure hearsay. For the following reasons, this affidavit, being otherwise uncorroborated by competent evidence and not reciting the evidentiary facts upon which the affiant's conclusion of presence in Alabama was based, is not sufficient to create the requisite conflict in evidence to mandate denial of the writ of habeas corpus as a matter of law.

In State v. McCreary, 165 So. 904 (Fla. 1936), the accused, Florio, was being held pursuant to a warrant of arrest

and filed a petition for writ of habeas corpus alleging he was not in the demanding state at the time of the alleged offense. The petition was denied by the trial court. On appeal the Florida Supreme Court noted a patent legal deficiency in that the demand of the governor of Connecticut had not been introduced in evidence and the record contained no certificate by the governor authenticating the supporting affidavits which had been introduced into evidence. Florio failed, however, to properly prove that the governor of Florida did not have the missing documents before him when he issued his warrant of arrest; therefore, the Supreme Court assumed that such documents were properly before the governor and concluded that he had valid jurisdiction to issue the warrant of arrest.

Nevertheless, the court went on to state that it appeared the circuit judge

had admitted the supporting affidavits as evidence of petitioner's presence in the demanding state at the time of the alleged offense. The court held that if the affidavits were admitted for this purpose:

The error in admitting them was probably prejudicial in its nature, thus requiring a reversal of the order for further proceedings not inconsistent with the holding hereinabove made, for the petitioner introduced some substantial testimony tending to prove that he was not in the demanding state at the time the offense was committed. This testimony was given before the circuit judge by witnesses who resided in Miami, and who were subjected to cross-examination. The petitioner had no opportunity to cross-examine the parties who signed the affidavits introduced in evidence by the respondent and which tended to show the contrary. While it is well settled that, upon habeas corpus proceedings in behalf of one held under an executive warrant of rendition, the courts of this state will not try the question of the guilt or innocence of the accused of an offense charged against the criminal laws of another state, yet the question of whether the accused is or is not a fugitive from justice is a question of fact, and it is competent for the accused to prove,

if he can, that he was not bodily present in the demanding state at the time the offense is alleged to have been committed. The decision of the Governor on this point, as shown by the issuance of his warrant of rendition, is sufficient to justify his arrest and extradition unless the presumption in its favor is overthrown by contrary proof.

For the error pointed out, the order remanding the petitioner to custody is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing opinion. It may be that upon another hearing further legal evidence may be available and may be introduced in evidence by either or both sides on the question last discussed. We reverse the case because on that issue the circuit judge may have considered, and probably did consider, the affidavits erroneously admitted in evidence.

165 So. at 906-07 (citation omitted).

McCreary strongly suggests, if not holds, that affidavits do not constitute competent proof to controvert a prisoner's live testimony in a habeas corpus proceeding challenging extradition because the prisoner is denied his right to cross-examine the affiants. We would accept

this reasoning and reach such holding were McCreary the controlling case addressing this issue. As noted above, however, habeas corpus proceedings challenging extradition are governed by the federal constitution and implementing statutes as construed by the United States Supreme Court and circuit courts of appeal. The Fifth Circuit Court of Appeal has held that affidavits containing competent and otherwise admissible evidence are sufficient in habeas corpus proceedings to raise disputed factual issues. United States v. Williams, 12 F.2d 66 (5th Cir. 1926). Accord Smith v. Idaho, 373 F.2d 149 (9th Cir. 1967). See also Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980), cert. denied, 449 U.S. 1036, 66 L.Ed.2d 497, 101 S.Ct. 612 (1980), holding that hearsay evidence which recited the evidentiary facts upon which the affiant

based the conclusion that the accused was present in the state when the offense was committed, is admissible in extradition proceedings. These relaxed rules of admissibility simply excuse the asylum state from having to produce live testimony by witnesses having personal knowledge in extradition proceedings, a requirement which would obviously be unnecessarily expensive and time-consuming to demonstrate only that a factual controversy does exist. With the exception of Brunelle v. Norvell, 433 So.2d 19, which we decline to follow, we have found no cases finding an evidentiary conflict on the issues of fugitiveness that did not involve either live testimony produced by the state, physical evidence properly authenticated, or affidavits based on personal knowledge or reciting the evidentiary facts supporting the conclusions stated therein. E.g.,

State v. Scratow, 456 So.2d 922 (Fla. 3rd DCA 1984); Bonazzo v. Michell, 221 So.2d 186 (Fla. 4th DCA 1969); Turiano v. Butterworth, 416 So.2d 1261 (Fla. 4th DCA 1982); State v. Starr, 65 So.2d 67 (Fla. 1953). We agree, therefore, that affidavits are admissible to create evidentiary conflict in habeas corpus proceedings challenging extradition, but conclude that such affidavits, in order to be competent to create such conflict, must be based on the personal knowledge of the affiant or, if based on hearsay known by the affiant, must recite the evidentiary facts upon which the affiant's conclusion is based. We hold that the sworn application for extradition in the instant case is not competent evidence to prove the petitioner was in Alabama at the time of the alleged offense because it was not based on the personal knowledge of

0

the district attorney and did not contain the necessary recitation of evidentiary facts upon which the district attorney based his conclusion.

To summarize, the petitioner presented competent evidence showing he was not in Alabama on the date of the offense, and the state presented no competent conflicting evidence. Because there was no conflict in the evidence, it was the trial court's duty to evaluate the testimony of appellant's witnesses, judge their credibility and persuasiveness, and make a finding of fact on whether petitioner had proven by clear and satisfactory evidence beyond a reasonable doubt that he was not in Alabama on the date of the alleged offense. South Carolina v. Bailey, 289 U.S. at 421-22. It appears from the order in the instant case that the trial court concluded only that no legal reason

existed for denying Josey's return to Alabama without making any finding of fact on whether Josey's evidence was sufficiently trustworthy to carry his burden of proof. Although unstated, the court likely based its conclusion on the Fourth District's decision in Brunelle v. Norvell, which we decline to follow.

As did our Supreme Court in State v. McCreary, 165 So. at 907, we reverse and remand for the trial court to make the appropriate finding of fact on whether petitioner has met his burden of proof, with leave to take additional evidence if necessary.

REVERSED AND REMANDED.

BARFIELD, J., CONCURS: SMITH, J., DISSENTS
WITH WRITTEN OPINION.

FOOTNOTES

¹The allegations of "unauthorized control" over the property alleged to have been stolen is consistent with either physical presence or absentee control; hence, the indictment cannot be construed as unequivocally alleging that Josey was present in Alabama when the alleged offense was committed. Section 941.06, Florida Statutes (1983), governs extradition of persons not present in the demanding state at the time of the commission of the crime. No attempt has been made to extradite Josey under this section, and this decision is limited to extradition under section 941.03, Florida Statutes (1983).

²Section 941.03, Florida Statutes (1983), states:

Form of demand.--No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under s. 941.06, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by an authenticated copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of a warrant supported by an affidavit made before a committing magistrate of the demanding state; or by a copy of a judgment

of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation, or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction, or sentence must be authenticated by the executive authority making a demand.

3On cross-examination of appellant, the state elicited testimony concerning appellant's past connections with Golden Plant Food Company in Headland, Alabama, approximately six months before the charged offense was committed. This testimony, along with other evidence produced on cross-examination, did not create a conflict in the evidence requiring denial of habeas corpus as a matter of law. Such testimony could, however, be deemed relevant to the court's consideration of the credibility and persuasiveness of appellant's witnesses.

SMITH, L., J., dissenting.

I respectfully dissent.

That the appellant had a recent connection with the State of Alabama, a recent

connection with the place in Alabama where the property was alleged to have been stolen (a mere 50 miles or so from his Florida home), and recent possession of the specific kind of property alleged to have been stolen, is established by appellant's own testimony. Furthermore, the evidence by one of appellant's witnesses that appellant was not in the state of Alabama when certain property of the same description was allegedly taken from the same owner, Don Johnson, does not eliminate appellant as the perpetrator of the crime charged in the indictment. The testimony regarding the loading of certain fertilizer belonging to Don Johnson by individuals purporting to be representatives of Golden Plant Food Company, is of little or no probative value in this case. It is noted that the indictment charges that the accused unlawfully "obtained" or "exerted unauthorized control" over the fertilizer.

The language used conforms to the requirements of Alabama law, under which the offense of theft may be committed in several different ways, including by means of what was formerly known as embezzlement. See, Alabama Criminal Code, § 13A-8-2, and Commentary. Thus, the mere fact that other persons took possession of certain similar property on a certain occasion does not warrant a finding that appellant could not have been in Alabama when he exerted unauthorized control over the fertilizer in question, or other fertilizer of the same kind. This could have occurred earlier on the same day, on the day before, or on some other prior date. A showing that the accused was not in the demanding state on the exact date when the crime was alleged to have been committed is not in itself grounds for discharge of the accused on habeas corpus, unless the

exact date or dates constitute a material element of the offense charged. See, People v. Lynch, 16 Ill.2d 380, 158 N.E.2d 60 (1959); Campbell v. Shapp, 385 F.Supp. 305 (E.D. Pa. 1974); Commonwealth of Pennsylvania, ex rel Kelly v. Aytch, 385 A.2d 508 (Pa. 1978).

It is true, as noted by the majority, that the Alabama indictment here does not allege a specific date on which the offense allegedly was committed. Alabama law does not require it. Alabama Criminal Code, § 15-8-30. The indictment may allege that the crime was committed on any specific day before the finding of the indictment, or it may allege generally, as this one does, that the crime was committed "before the finding of the indictment." Id. This particular language has been approved as sufficient to state when the crime was committed for purposes of extradition.

Ex Parte Drake, 363 SW 2d 781 (Crim.App.Tex. 1962).

Appellant's admitted connections with Alabama, and with the Alabama fertilizer dealership which apparently (if appellant's witness is to be believed) was implicated (at least by name) in a fertilizer theft, and appellant's own admission that he came into possession of the same type of fertilizer by delivery in a truck bearing Missouri license plates weigh heavily, in my opinion, against appellant's purely technical defense based upon a contention that he was not in Alabama during a certain twenty-four hour period. In any event, the critical testimony bearing upon appellant's whereabouts was given by appellant and his wife. This evidence is hardly of the caliber that one would expect a trial court to find persuasive given the circumstances of this case.

Similar evidence was rejected by the court in Ex Parte Sutton, 455 SW 2d 274 (Crim.App. Tex. 1970) (testimony of the accused and his wife that he was not in the demanding state on the day the offense was charged to have been committed is not sufficient to defeat extradition).

I particularly take issue with the majority's holding that "the demand for extradition required by section 941.03 cannot, standing alone, be deemed competent evidence to create a conflict on the factual issue of fugitiveness." This is contrary, I believe, to the authorities on the point. But aside from the incorrectness of this holding from a purely legal standpoint, it is contrary to the majority's disposition of this appeal, since by the express language of the majority's opinion, on remand the trial court may deny habeas corpus by merely finding that upon evaluation of

the testimony of appellant and his witnesses, the petitioner has failed to prove "by clear and satisfactory evidence beyond a reasonable doubt that he was not in Alabama on the date of the alleged offense." I believe the record already demonstrates this failure on appellant's part, and I would not disturb the trial court's ruling.

I further disagree with the majority's holding that the trial court's ruling that there is "no legal reason" to deny appellant's return to Alabama is insufficient to dispose of the petition for habeas corpus. I think the record discloses a reasonable basis for the trial court's ruling, which is all that is required. I would affirm.

A-111

IN THE CIRCUIT COURT
OF THE FOURTEENTH
JUDICIAL CIRCUIT,
IN AND FOR HOLMES,
COUNTY, FLORIDA.

CASE NO. 84-43 cf

STATE OF FLORIDA,

VS.

JIMMY JOSEY,
Defendant,

ORDER

This Court having heard testimony of witnesses presented by the Defendant on April 17, 1984, and being fully advised in the premises, does hereby order that:

1. There is no legal reason that would bar Alabama Authorities from returning Jimmy Josey to the State to answer criminal charges named in the Governor's Rendition Warrant.
2. Extradition of Jimmy Josey is to be stayed pending a prompt appeal of this Order by the said Jimmy Josey.
3. Jimmy Josey shall remain at liberty on his present bond pending the appeal of this matter.

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DONE AND ORDERED in Bonifay, Holmes
County, Florida, this 4th day of May,
1984.

WARREN EDWARDS,
CIRCUIT JUDGE

THE STATE OF FLORIDA

To all and singular the Sheriffs and all
Peace Officers of the Several Counties
of this State to Whom This May Come,
Greetings:

WHEREAS, the Executive authority
of the State of Alabama has demanded of
the Executive authority of the State of
Florida the delivery and surrender of
the body of Jimmy D. Josey as a fugitive
from justice from said State of Alabama
to said State of Florida, and has produced
and filed with the Executive authority
of said State of Florida to which said
State Jimmy D. Josey has fled from the
State of Alabama a copy of Demand, & Indict-
ment charging the said person so demanded
with having committed in said State of
Alabama against the laws of said State
of Alabama the crime of Theft of Property,
Second Degree and which is certified as
authentic by the Executive of said State
of Alabama.

NOW, THEREFORE, This is to command you to apprehend and arrest the body of the said Jimmy D. Josey and deliver his said body to Sheriff J.F. Welcher and Guard agent of the said State of Alabama, duly authorized and empowered to receive and convey the said Jimmy D. Josey to the state of Alabama, then and there to be surrendered to the legal authorities of said State, to be dealt with according to law;

PROVIDED, NEVERTHELESS, AND IT IS EXPRESSLY UNDERSTOOD, That all fees, expenses or charges in the execution of this order be paid by the said State of Alabama.

Hereof fail not at your peril.

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IN WITNESS WHEREOF, I have here-
unto signed my name, and caused to be
affixed the Great Seal of State, at
Tallahassee, Florida, this 26th day
of March A.D., 1984.

(SEAL)

Governor

By the Governor:

Secretary of State

Executive Department

STATE OF ALABAMA

The Governor of the State of Alabama
To His Excellency, the Governor of Florida

Whereas, It appears by the annexed copy of a CERTIFIED COPIES OF INDICTMENT AND WRIT OF ARREST which is hereby duly certified to be authentic in accordance with the Laws of this State, that JIMMY D. JOSEY stands charged with the crime of THEFT OF PROPERTY, 2ND DEGREE committed in the County of HENTY in this State, and it has been represented to me that JIMMY D. JOSEY was personally present in the State of Alabama at the time of the alleged commission of said offense, and has fled from justice of this State and has taken refuge in the State of FLORIDA.

Now, Therefore, pursuant to the provisions of the Constitution and Laws of the United States in such case made and provided, I request that you cause the said JIMMY D. JOSEY to be apprehended and delivered to SHERIFF J.F. WELCHER AND GUARD who is hereby authorized to

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receive and convey him to the State of Alabama, there to be dealt with according to law.

(SEAL)

In Witness Whereof,
I hereunto set my
hand and caused the
Great Seal of the
State of Alabama to
be affixed by the
Secretary of State,
at the Capitol, in
the City of Montgomery
on this day.

March 8, 1984

Date

George C. Wallace
Governor

Don Siegelman
Secretary of State

APPLICATION FOR EXTRADITION
STATE OF ALABAMA, HENRY COUNTY

To His Excellency, GEORGE C. WALLACE,
Governor of the State of Alabama:

The undersigned THOMAS W. SORRELLS,
District Attorney of the 20th Judicial
Circuit of Alabama, respectfully represents
unto Your Excellency:

That one JIMMY D. JOSEY is charged
in the HENRY County CIRCUIT COURT with
the offense of THEFT OF PROPERTY, 2ND
DEGREE (as shown by the certified copies
of the Indictment and writ of arrest accom-
panying this petition), alleged to have
been committed on, to-wit: October 16,
1983, at the city of Headland, in the
county of Henry, in the State of Alabama,
in that:

Jimmy D. Josey, did knowingly obtain or
exert unauthorized control over ten tons
of nitrogen fertilizer, the property of

Don Johnson, of the value of, to-wit: \$1,500.00, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.

That said Jimmy D. Josey was present in the State of Alabama at the time of the commission of the crime.

That said Jimmy D. Josey is now a fugitive from justice in this State and is believed to have taken refuge in the State of Florida and is at the present time in or near Bonifay in that State.

That is is necessary for the ends of justice that said fugitive should be returned to the State of Alabama; that this petition is made in furtherance of the ends of public justice and not for any private claim whatever, or for the collection or enforcement of a debt, or for any other improper purpose.

Your petitioner suggests to Your Excellency the name of Sheriff J.F. Welcher and guard, who resides at Headland Alabama, and who has no private or personal interest in the apprehension of said fugitive as a suitable person to be commissioned as agent of the State in said extradition.

Your petitioner hereby certifies that he has investigated the facts in

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the above named case; that the testimony in said case is accessible; and that in his opinion a conviction will be had if said case is brought to trial.

District Attorney
20th Judicial Circuit
of Alabama.

Sworn to and subscribed before me,
this the 9th day of February,
1984.

(SEAL)

Clerk, Henry County
Circuit Court

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CERTIFICATE

DISTRICT/CIRCUIT COURT OF HENRY COUNTY

THE STATE OF ALABAMA.

HENRY COUNTY.

I, CONNIE BURDESHAW, Clerk of the District/Circuit Court, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal, and that I am the qualified Clerk of said Court, and the keeper of said Seal. I further certify that ~~Honorable~~ JERRY M. WHITE is a duly commissioned Judge of the District/Circuit Court, and under the Laws of said State all of his official acts as such Judge are entitled to full faith and credit. I further certify that his official signature to the certificate below is his genuine official signature and in due form.

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IN TESTIMONY WHEREOF, I hereunto
affix my official signature and Seal of
the Court, at the city of Abbeville, Alabama
this 9th day of February, 1984.

Clerk District/Circuit
Court

=====

THE STATE OF ALABAMA,
HENRY COUNTY

I, JERRY M. WHITE, Judge of the
District/Circuit Court, do hereby certify
that the same is a Court of Record, having
a Clerk and Seal, and that CONNIE BURDESHAW
is the qualified Clerk of said Court,
and the keeper of the Seal thereof, and
that his official signature to the foregoing
certificate is his genuine official signature
with the Seal of said Court affixed.

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Witness my hand and official signature
at the city of Dothan , Alabama, this
the 9th day of February , 1984.

Judge District/Circuit
Court

THE STATE OF ALABAMA
HENRY COUNTY

CIRCUIT COURT
SPRING TERM, 1984

The Grand Jury of said County Charge that, before the finding of this Indictment

Jimmy D. Josey, whose name is to the Grand Jury otherwise unknown, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to-wit: \$1,500.00 with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.

against the peace and dignity of the State of Alabama.

THOMAS W. SORRELLS
DISTRICT ATTORNEY
of the 20th Judicial
Circuit

A TRUE BILL

Ray S. Reily

Foreman of the Grand Jury
presented to the Court by
the Foreman of the Grand
Jury in the presence of
18 other Grand Jurors.

Filed 1-31, 1984

Connie Burdeshaw, Clerk

Writ of arrest ordered issued
and amount of bail to be
required of the Defendant

\$1,000.00

_____, Judge

No. 43 Page

=====

THE STATE OF ALABAMA

HENRY COUNTY

=====

CIRCUIT COURT

=====

THE STATE

vs.

JIMMY D. JOSEY

=====

INDICTMENT

THEFT OF PROPERTY, 1ST DEGREE

Prosecutor

No

=====

STATE WITNESSES

Don Johnson
Carl Edmondson
J.R. Cox
Fred Mann
Holmes County, Florida

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I, Connie Burdeshaw, Clerk of
the Circuit Court of Henry County,
Alabama, hereby certify that this
is a true and correct copy of the
original indictment with all the
endorsements thereon, in case of
the State of Alabama against
JIMMY D. JOSEY

This 6th day of February,
1984

Connie Burdeshaw
Clerk of the Circuit Court of
Henry County, Alabama

=====

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writ of arrest

THE STATE OF ALABAMA, HENRY COUNTY

CIRCUIT COURT

To any Sheriff of the State of Alabama --
Greetings:

An indictment having been found against
Jimmy D. Josey at the Spring Term, 1984,
of the Circuit Court of Henry County,
for the offense of Theft, 1st. You are
therefore commanded forthwith to arrest
said Jimmy D. Josey and commit him/her
to jail, unless he/she gives bail
(\$1,000.00) to answer such indictment
at the next term of our Circuit Court,
to be holden for said County, on the_
4th Tuesday in April (4-24-84) next,
and make return of this writ according
to law.

Witness my hand, this 31st day
of January, 1984.

C. Burdeshaw, Clerk

87-6884

Supreme Court, U.S.

FILED

MAR 25 1968

JOSEPH E. SPANGLER
CLERK

CASE NO. A-231

IN THE
SUPREME COURT OF THE UNITED STATES

DREW GALLOWAY, SHERIFF
Holmes County, Florida,

Petitioner,

vs.

JIMMY JOSEY

Respondent.

ANSWER TO

PETITION FOR WRIT OF CERTIORARI

W. PAUL THOMPSON
Attorney for Respondent
P. O. Drawer 608
DeFuniak Springs, Florida 32433

904 892 2117

28/177

CASE NO. A-231

IN THE
SUPREME COURT OF THE UNITED STATES

DEAN GALLOWAY, SHERIFF,
Holmes County, Florida,

Petitioner,

vs.

JIMMY JOSEY

Respondent.

ANSWER TO

PETITION FOR WRIT OF CERTIORARI

W. PAUL THOMPSON
Attorney for Respondent
P.O. Drawer 608
DeFuniak Springs, Florida 32433

904 892 2117



QUESTIONS PRESENTED FOR REVIEW

WHERE A PETITIONER IN AN
ASYLUM STATE HABEAS CORPUS
PROCEEDING FILED TO CONTEST
EXTRADITION PRESENTS
EVIDENCE THAT HE IS NOT A
FUGITIVE, IS THE EXTRADITION
WARRANT AND ANNEXED
DOCUMENTATION, WITHOUT
MORE, SUFFICIENT TO CREATE
CONFLICTING OR CONTRADICTORY
EVIDENCE REQUIRING
REMAND?

WHETHER HEARSAY AFFIDAVITS,
UNSWORN STATEMENTS OF ABSENT
WITNESSES, AND EX PARTE
AFFIDAVITS ARE ADMISSIBLE
IN STATE HABEAS CORPUS
PROCEEDINGS FILED TO
CONTEST INTERSTATE
EXTRADITION.

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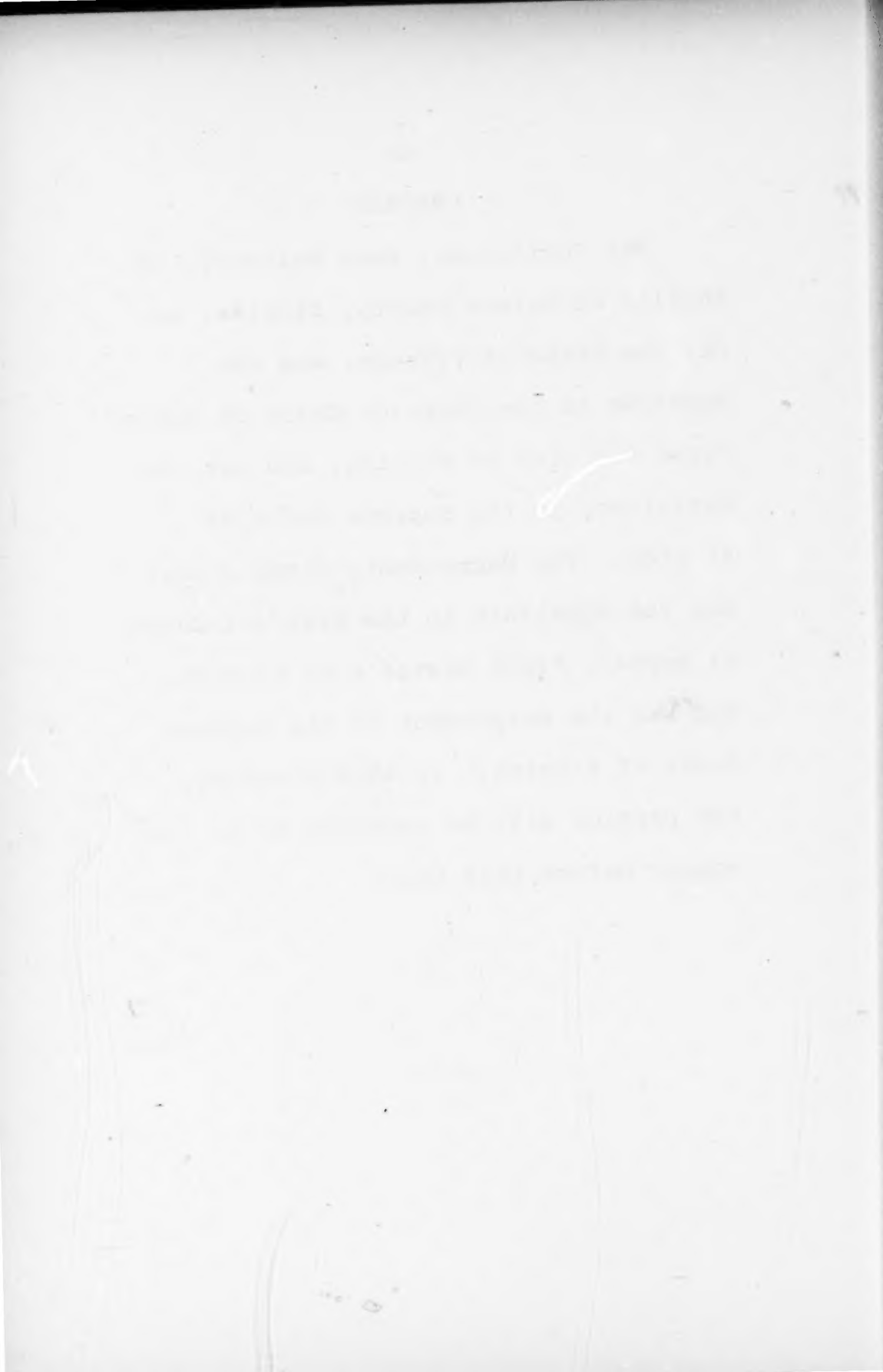
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SMITH V. STATE OF IDAHO

363 F2d 149 (9th Cir. 1967)

PREFACE

The Petitioner, Dean Galloway, as Sheriff of Holmes County, Florida, ex. rel the State of Florida, was the appellee in the District Court of Appeal First District of Florida, and was the Petitioner in the Supreme Court of Florida. The Respondent, Jimmy Josey, was the Appellant in the District Court of Appeal, First District of Florida, and was the Respondent in the Supreme Court of Florida. In this pleading, the parties will be referred to as they appear before this Court.



OPINIONS BELOW

The opinion of the Supreme Court of Florida was rendered on April 16, 1987. This decision is reported at 507 So.2 590, and is reproduced in Respondent's Appendix at A-1.



**GROUNDS UPON WHICH
JURISDICTION IS INVOKED**

 The opinion of the Supreme Court of Florida was rendered on April 16, 1987. The Petitioner's timely motion for rehearing was denied by the Supreme Court of Florida on June 25, 1987. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. Sec. 1257(3) and Rule 17(1)(b) and (c), Rules of the Supreme Court of the United States. This is a civil case.

THE OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

The Office of the Attorney General
has the honor to acknowledge the receipt
of your letter of the 10th inst.
and in reply to inform you that the
same has been forwarded to the
proper authorities for their consideration.
Very respectfully,
The Attorney General

FEDERAL CONSTITUTIONAL PROVISIONS
AND STATUTES INVOKED

Article IV, Section 2, Clause 2, of the United States Constitution, provides as follows:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

Title 18 U.S.C. Sec. 3182 implements the above provision, and provides as follows:

Wherever the executive authority of any state or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produced a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, testified as authentic by the governor or chief magistrate of the State or Territory to which such a person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear.

Florida's adoption of the Uniform Criminal Extradition Act (Section 941.01 - 941.29, Fla. Stat. 1941) includes Section 941.02 which specifically provides:

Sec. 941.02 FUGITIVES FROM JUSTICE:-
DUTY OF GOVERNOR

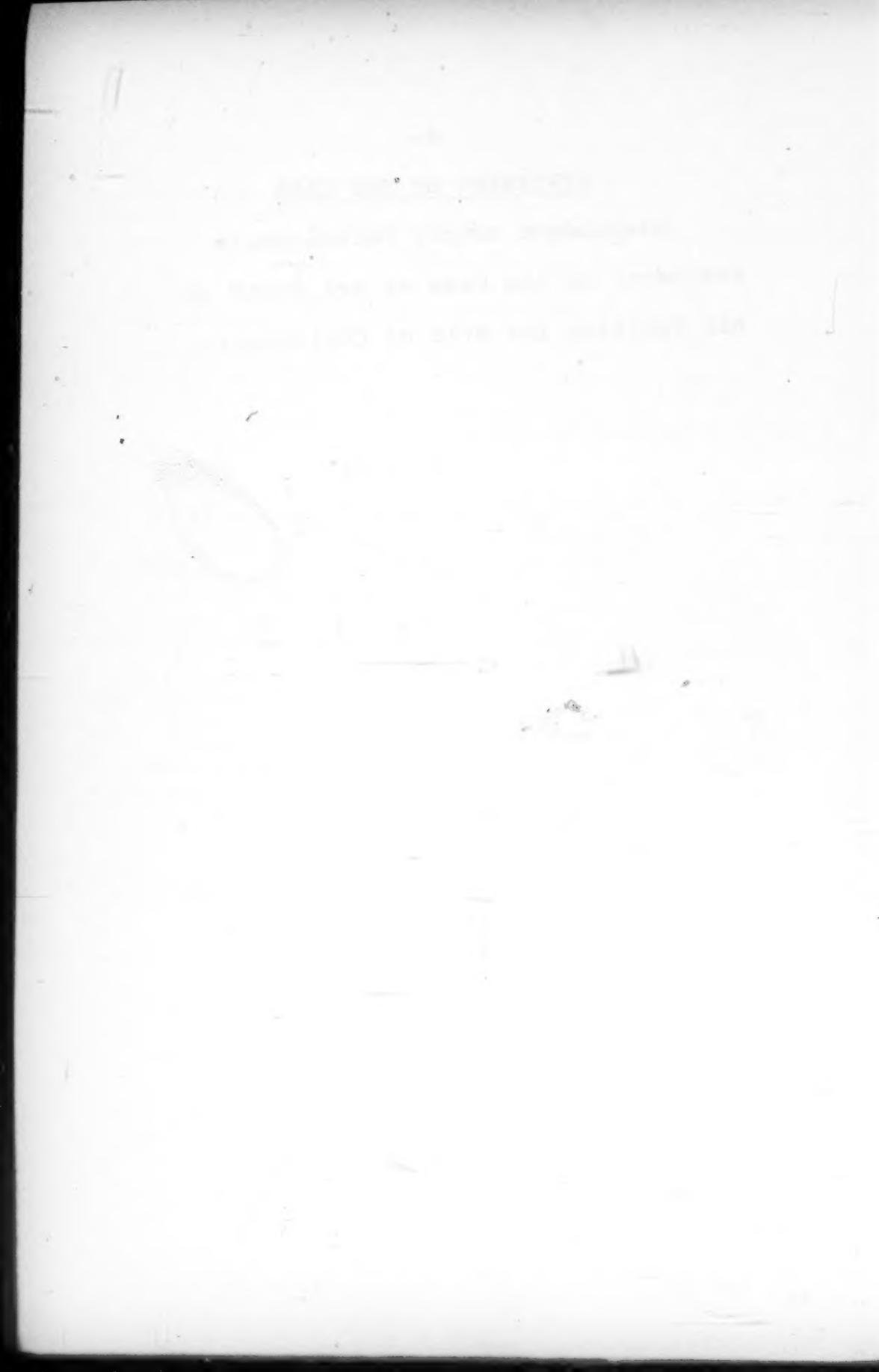
Subject to the provisions of this chapter, the provisions of the Constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any persons charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
CHICAGO, ILLINOIS 60637

TO THE EDITOR OF THE JOURNAL OF THE AMERICAN CHEMICAL SOCIETY
FROM THE DEPARTMENT OF CHEMISTRY, UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637
RE: [Illegible Title]
[Illegible text block containing details of the research or publication]

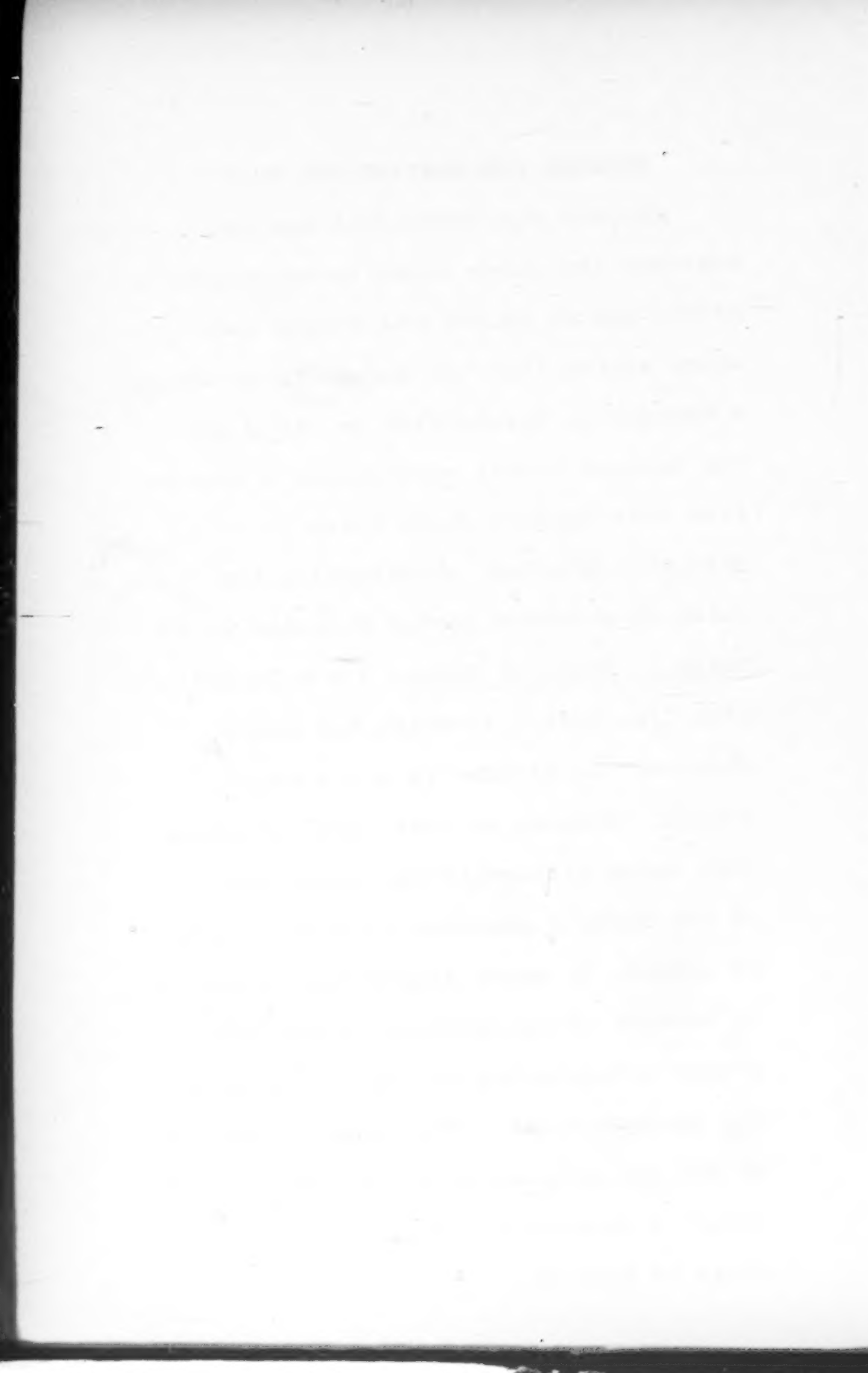
STATEMENT OF THE CASE

Respondent adopts Petitioner's
Statement of the Case as set forth in
his Petition for Writ of Certiorari.



REASONS FOR DENYING THE WRIT

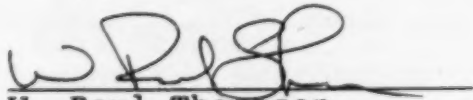
Counsel for Respondent has researched the cases cited in Petitioner's brief, and found not one single case which states that the documents on which a Warrant in Extradition is based and the Warrant itself constitutes a conclusive case against which there is no defense. Granted, occasionally the rules of evidence seemed strained as in Smith v. State of Idaho, 373 F.2d 149 (9th Cir. 1967), in which the court received six Affidavits and a Deposition. Nothing in that case indicates that using Affidavits was questioned. If the State's position in this matter is upheld, it means simply that there is no defense to extradition, other than patent irregularity or insufficiency of the documentation. The issue of whether or not the accused is a fugitive is no longer a defense to extradition in the State of Florida.



CONCLUSION

The decisions of the Florida Supreme Court and the First District Court of Appeal of the State of Florida should be upheld, and the trial court's order denying Habeas Corpus was properly reversed.

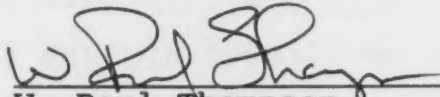
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Paul Thompson', written over a horizontal line.

W. Paul Thompson
Attorney for Respondent
P.O. Drawer 608
DeFuniak Springs
Florida 32433
(904)892-2117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Counsel for Petitioner, Andrea Smith Hillyer, Assistant General Counsel, The Capitol, Tallahassee, Florida 32301, this 15th day of March, 1988.



W. Paul Thompson
Attorney for Respondent

SUPREME COURT OF FLORIDA

No. 67,747

DREW GALLOWAY, as sheriff
of Holmes County, Petitioner

vs.

JIMMY JOSEY, Respondent.

[April 16, 1987]

BARKETT, J.

We have for review Josey v. Galloway, 482 So.2d 376 (Fla. 1st DCA 1985), certified as in conflict with Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983). We have jurisdiction. Art. V, S3(b)(4), Fla. Const.

We are asked to determine the burden of proof a respondent must bear to overcome an existing presumption that he is a fugitive from justice and therefore subject to extradition. We conclude that when a warrant is based upon a facially valid probable cause hearing in the foreign state, the accused may only defeat extradition as to this issue by producing clear and convincing proof that he is not a fugitive from justice.

On January 31, 1984, an Alabama grand jury returned the indictment in this case charging that:

Jimmy D. Josey, whose name is to the Grand Jury otherwise unknown, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to wit: \$1500, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.

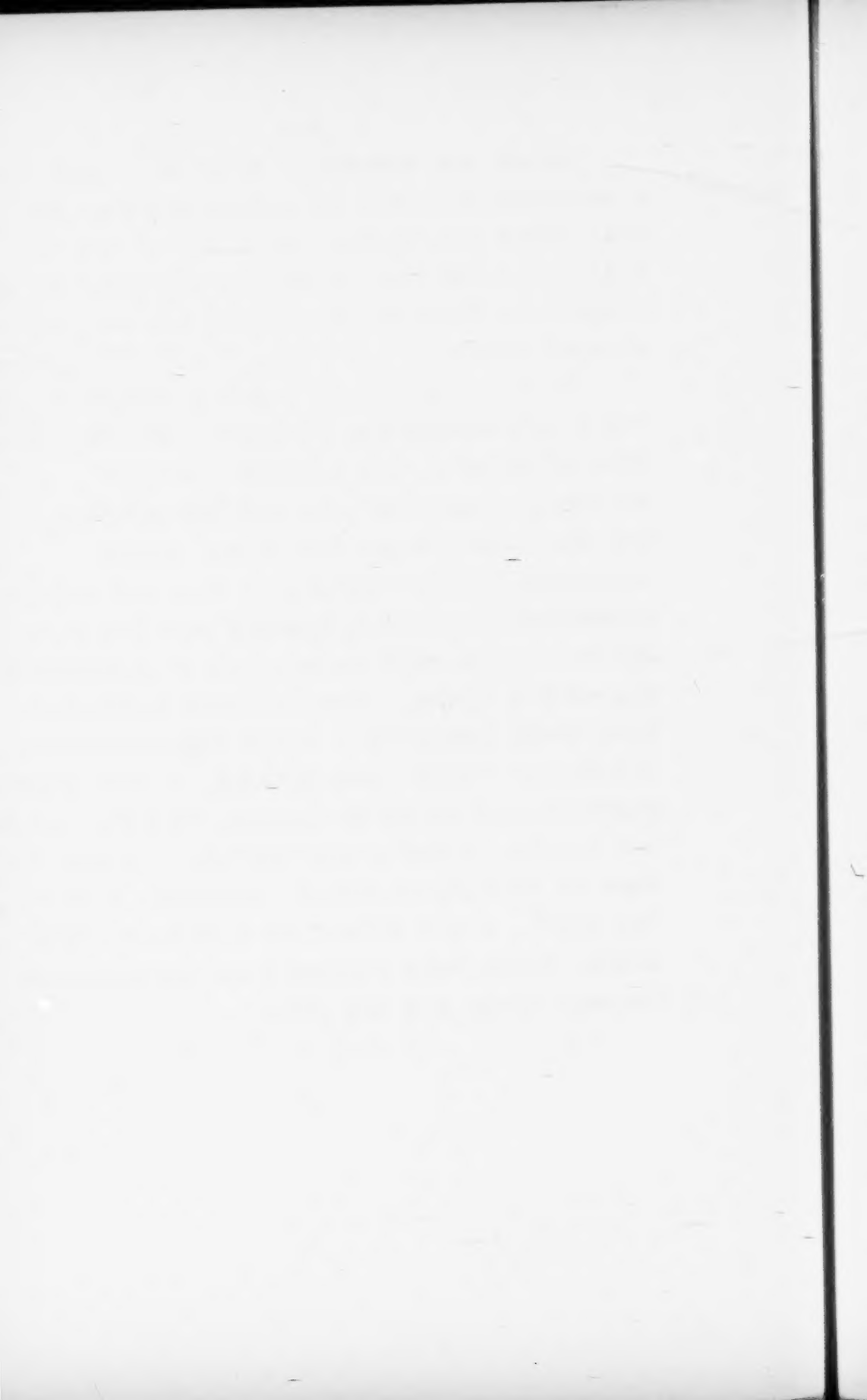
482 So.2d at 380 (footnote omitted).

Based on these charges Alabama authorities issued a writ of arrest.

The District Attorney for the Twentieth Judicial Circuit of Alabama then filed a sworn application asking the governor of Alabama to seek Josey's extradition. In pertinent part, this petition alleged that Josey had been charged with second-degree theft, had been present in Alabama at the time of the crime, and currently was a fugitive from justice in Florida. The governor of Alabama issued a demand for extradition to the governor of Florida, attaching copies of the indictment and the writ of arrest. Honoring this request, the governor of Florida issued a warrant.

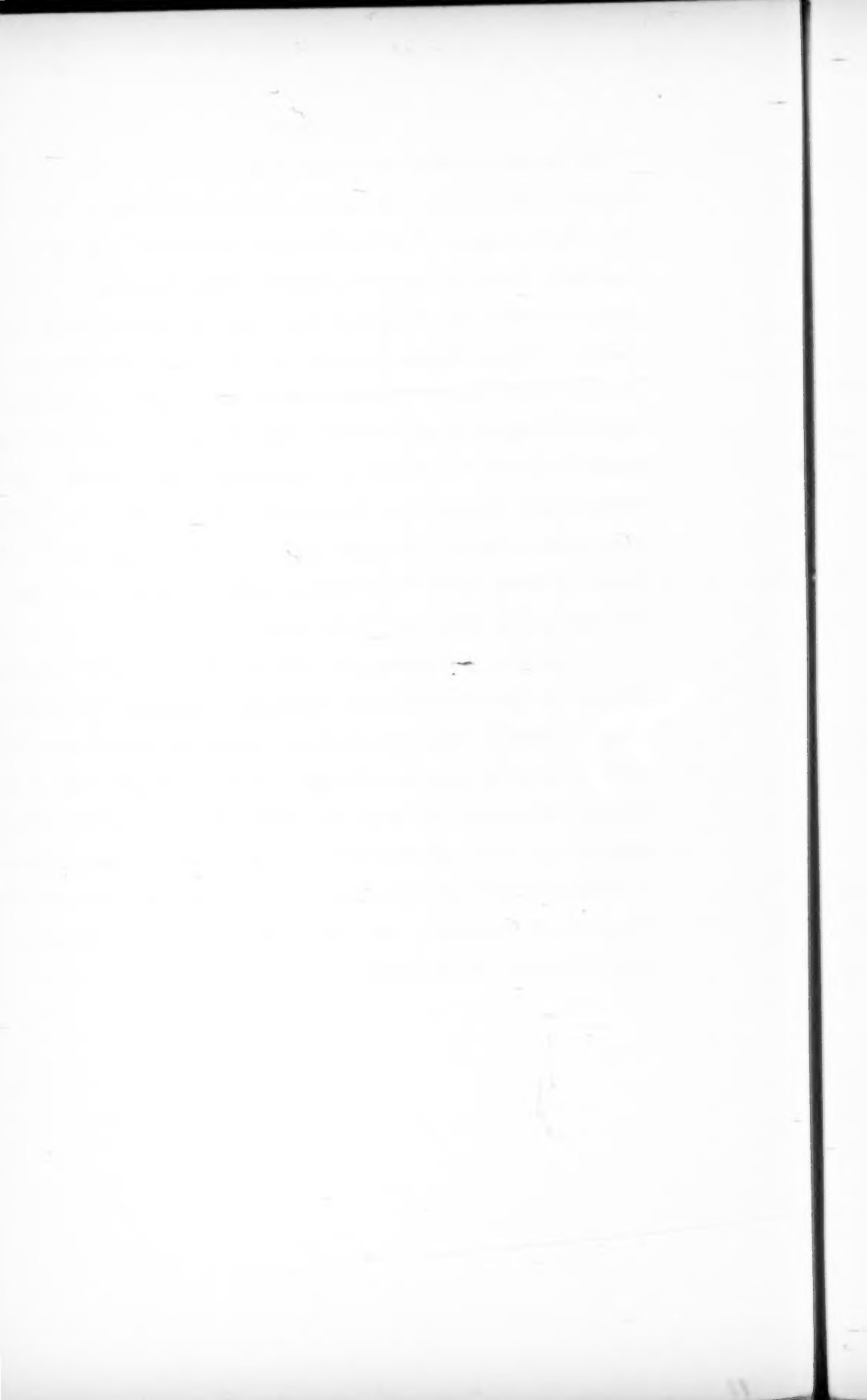
After his arrest in Florida, Josey filed a petition for writ of habeas corpus. He challenged the allegation that he was a fugitive from justice and argued that he was present in Florida the entire day of the alleged theft.

At the hearing on Josey's petition, the state introduced the Alabama indictment and writ of arrest, the Alabama district attorney's application, and the Florida warrant, and rested its case. Josey responded to the charges by calling seven witnesses, including himself and his wife, who testified that he was not in Alabama the day of the theft. The evidence reflected that Josey had been a sales representative for Golden Plant Food Company, a fertilizer manufacturer in Henry County, Alabama. On his own behalf, Josey testified that he had not been in or near Headland, Alabama, site of the theft, since attending a meeting with Golden Plant Food representatives sometime between March and May 1983.



An eyewitness to the theft testified that it occurred on October 16, 1983. At that time, individuals purporting to be Golden Food Company employees loaded fertilizer belonging to Don Johnson and drove away. This eyewitness said that he knew Josey and that Josey "was not one of the individuals there with the truck loading the fertilizer." Four witnesses testified that they saw Josey in Bonifay, Florida, during various times of the day on October 16, 1983. Both Josey and his wife testified that he was in Bonifay the entire day.

After argument, the trial court denied Josey's petition for habeas corpus, finding that "there was no legal reason that would bar Alabama authorities from returning Jimmy Josey to that state to answer criminal charges named in the governor's rendition warrant." Josey obtained review in the First District Court of Appeal, which remanded for legally sufficient findings of fact:

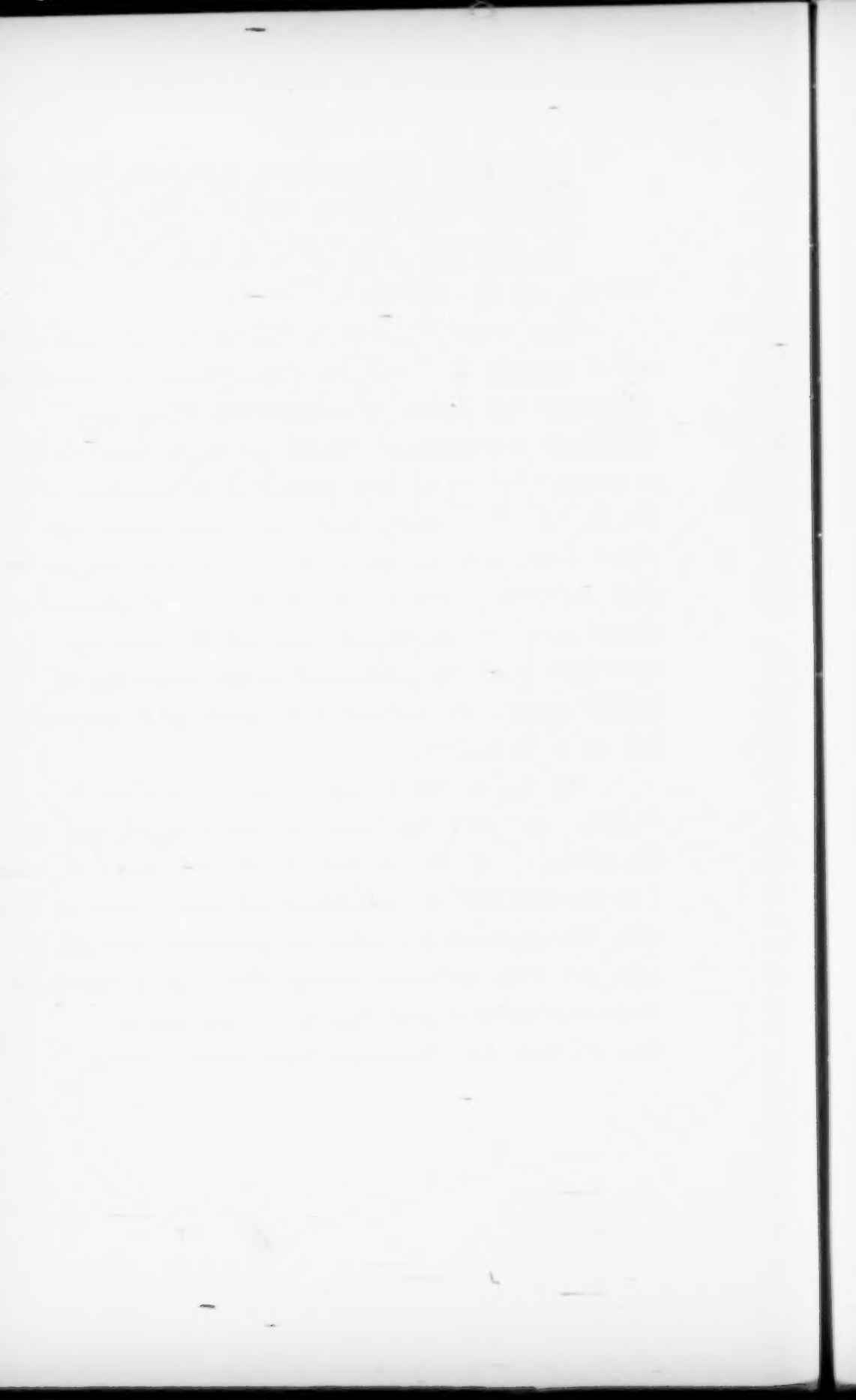


Since the trial court did not find that appellant failed to meet his burden of proof, but stated simply that "no legal reason" existed for denying his return to Alabama, it appears the court may have denied the writ as a matter of law.

482 So.2d at 382-83.

The First District below noted conflict with Brunelle based on the latter's assertion that extradition is mandatory when the accused's evidence "does no more than create a conflict" with the state's evidence. 433 So.2d at 20. Interpreting this language to mean that any evidentiary conflict requires extradition, the First District rejected the reasoning of Brunelle and found that an accused must be afforded some meaningful opportunity to defeat the presumption that he is a fugitive.

We agree with the First District's reasoning, but decline to read Brunelle so narrowly. To do so would render meaningless the guarantee of a habeas corpus hearing and the accompanying right to present evidence against the warrant under Florida's Uniform Interstate Extradition Act, sections 941.01-941.42, Florida Statutes (1985),



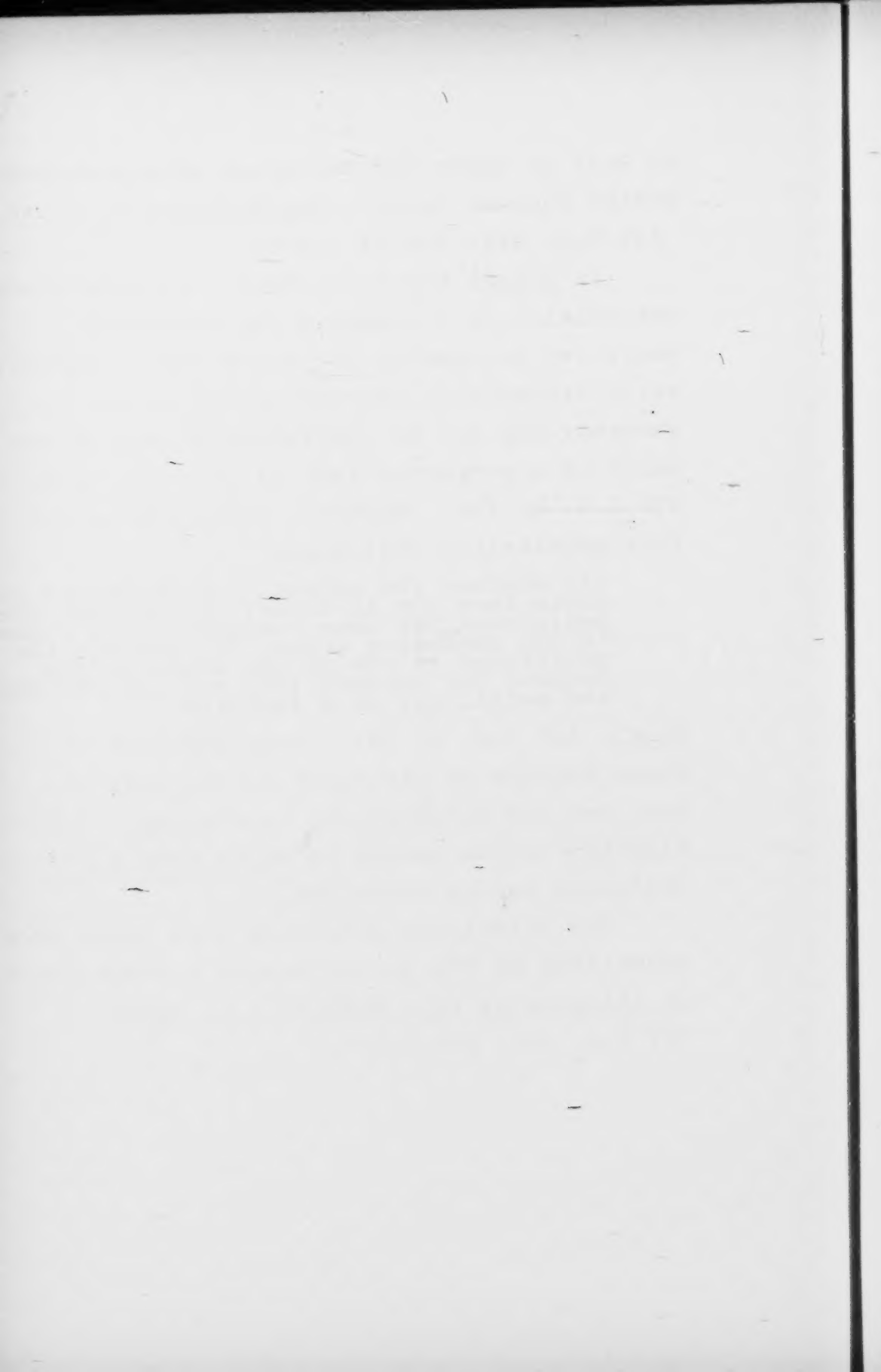
as well as under the decisions of the United States Supreme Court. See Michigan v. Doran, 439 U.S. 282, 288-89 (1978).

In Doran, the Court held that interstate extradition is a summary and mandatory executive proceeding and ruled that a facially valid extradition warrant issued by the governor may not be challenged solely on the basis of a purported lack of probable cause. 439 U.S. at 290. However, Doran recognized four permissible challenges:

(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Doran, 439 U.S. at 289. Only the last of these factors is pertinent to the case at bar, and the focus of our inquiry is directed to the manner by which such a challenge can be sustained.

The principles governing this issue were enunciated by the United States Supreme Court in Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 109 (1907).



One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

In McNichols, the accused contended he was in a different state on the day of the crime, but could only account for his presence there during a few hours of the afternoon. The warrant did not limit the time of the crime to the afternoon hours, and the crime occurred approximately one to one and one-half hours from the place the defendant purported to be. Based on these scant facts, the McNichols court found that the accused had not defeated the presumption that he was a fugitive from justice.

In South Carolina v. Bailey, 289 U.S. 412 (1933), the Supreme Court again spoke on the issue, using the language later adopted by the Fourth District in Brunelle. The Court in mid-thought stated:

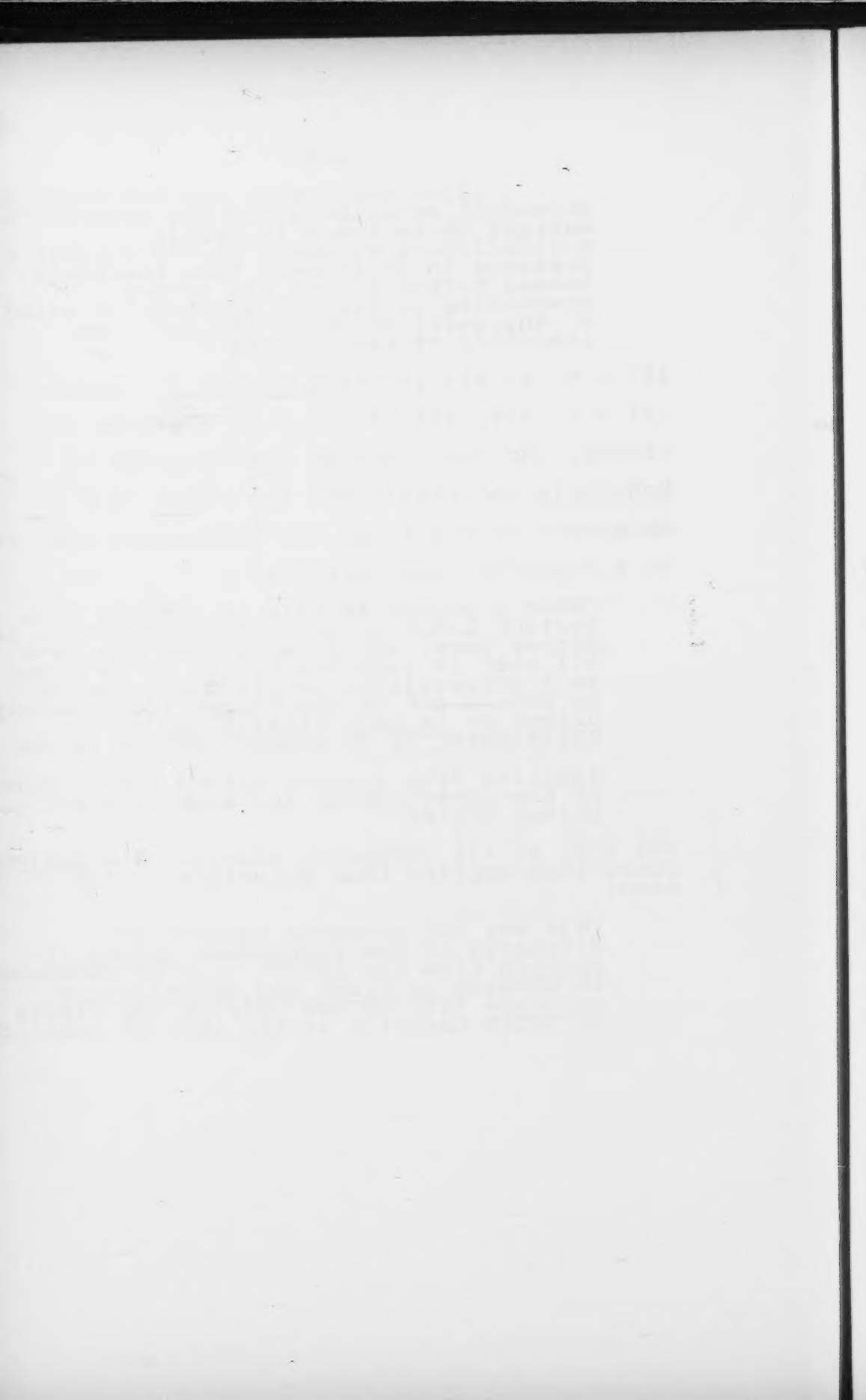
" . . . [T]he court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

289 U.S. at 421 (quoting Munsey v. Clough, 196 U.S. 364, 374 (1905)). In the same pen stroke, the Court echoed the language of McNichols and reaffirmed the right of a defendant to challenge the presumption that he is a fugitive from justice:

"When a person is held in custody from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

289 U.S. at 421 (emphasis added). The Bailey court then applied this principle to its case:

[W]e may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of homicide.



289 U.S. at 421-22 (emphasis added).

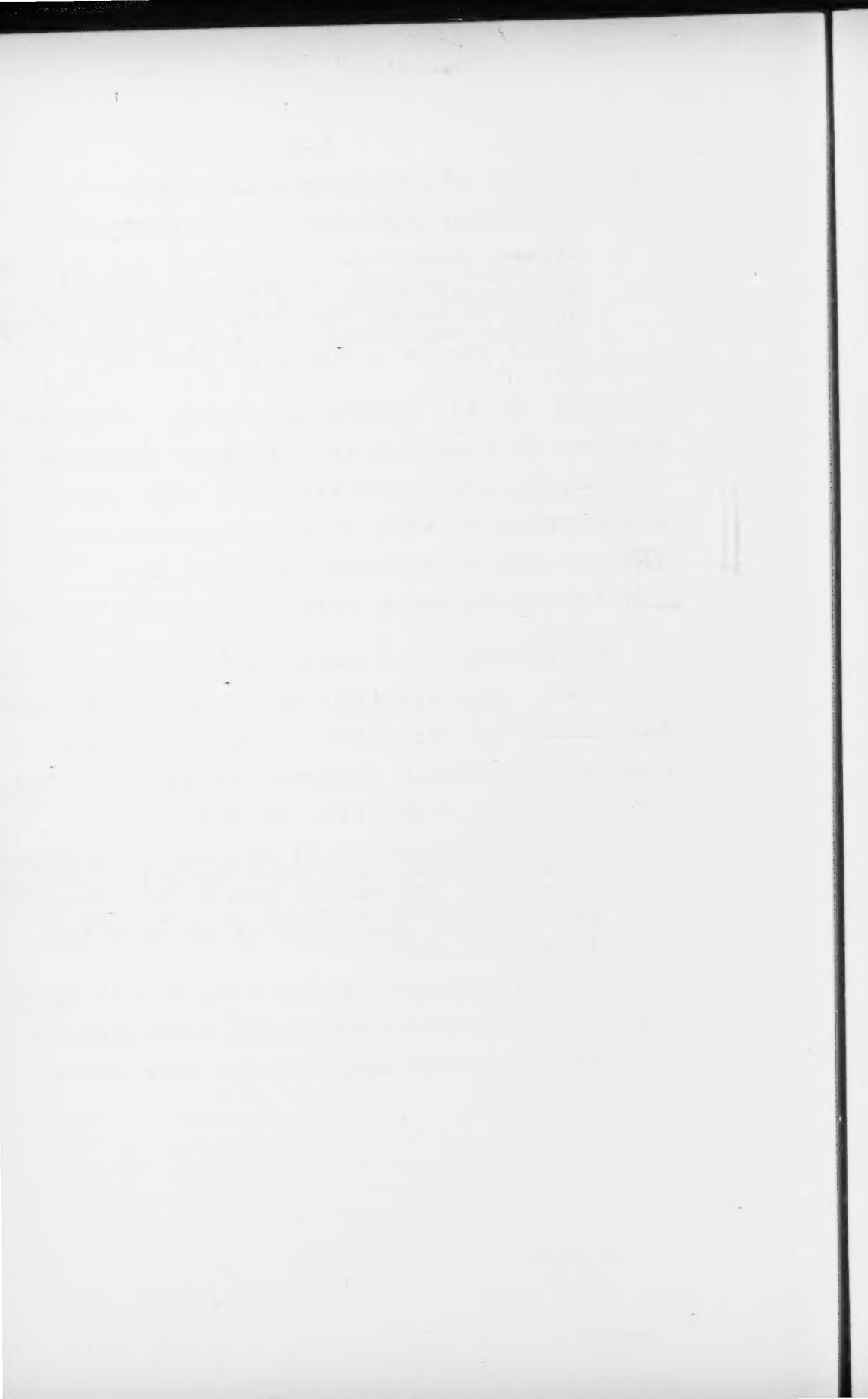
The Court then rephrased the principle:

Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.

289 U.S. at 422 (emphasis added). Despite the use of somewhat inconsistent language, the Bailey court plainly held that the presumption arising from the governor's warrant can be defeated by clear and convincing evidence that the accused was not in the jurisdiction where and when the crime occurred. See also Walton v. State, 98 Idaho 442, 566 P.2d 765 (1977). As the Second District correctly observed in State v. Cox, 306 So.2d 156, 159 (Fla. 2d DCA 1974):

The question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and there-after departed from that state.

Partly because of the language in Bailey, the Florida courts have shown considerable confusion in their approach to this issue.



Under facts similar to those of the present case, the Third District in State v. Davila, 481 So.2d 486, 492 (Fla. 3d DCA 1986) (on rehearing), held that a petitioner cannot defeat the governor's warrant if the evidence "does no more than create a conflict . . . on the question of his whereabouts (during the crime)." Earlier, that same court in State v. Scoratow, 456 So.2d 922, 923 (Fla. 3d DCA 1984), had held that the burden is on the accused to "'overthrow conclusively the presumption against him'" (quoting State ex rel. Kimbro v. Starr, 65 So.2d 67, 68 (Fla. 1953)); but the Scoratow court went on to say that "merely contradictory evidence on the issue of the accused's presence in or absence from the demanding state" will not defeat the warrant. 456 So.2d at 923. Our own holding in Kimbrow may have added to the confusion by noting that a court's "plain duty" is to deny habeas corpus releif where the evidnce "is in direct conflict." 65 So. 2d at 69. Based on our reading of Bailey and the Florida Uniform Interstate Extradition Act, we find that

conflict of evidence is not the appropriate standard for testing a petitioner's challenge. The sole question is whether the petitioner has defeated the presumption of validity with clear and convincing proof he was not in the demanding jurisdiction when the crime occurred.

We next turn to a related evidentiary issue addressed by the court below. Based on its reading of pertinent caselaw, the First District concluded that the state cannot meet its burden of proof merely by submitting affidavits not based on first-hand knowledge. 482 So.2d at 385. This holding, while essentially correct, requires clarification. We agree with the First District that affidavits not based on first-hand knowledge carry little evidentiary value, either in the state's or the petitioner's case. However, other than to prove that the petitioner is the same person named in the original charges, the quality of the state's proof becomes an issue only if the petitioner comes forward with clear and convincing evidence that he is not a fugitive. The burden then shifts to the state

to produce competent evidence discrediting the petitioner's proof to such a degree that it ceases to be clear and convincing. While the court may receive any evidence it deems proper, affidavits and other hearsay not based on first-hand knowledge, without more, are insufficient to meet the state's burden on this issue. We hasten to note, however, that the evidentiary value of any extradition paper has no effect on the presumption that the petitioner is a fugitive, which arises immediately upon issuance of a valid warrant.

Adhering to these core principles, the First District remanded the present action to the trial judge to weigh its evidence under the appropriate legal standard. We concur and cite with approval a pertinent analysis by the Supreme Court of Idaho:

If a petitioner presents no evidence, the presumption operates to mandate the extradition. If a petitioner does present evidence, the trial court must decide whether the petitioner has established by clear and convincing evidence that he was absent from the demanding state at the time of the offense.

The state, at its option, may present evidence or not. If [the state] chooses to submit additional affidavits, the court must view all evidence presented and determine whether, on balance, the petitioner has carried his burden. . . . If, on the other hand, no evidence is presented by the state, and the court is faced with uncontroverted evidence from the defendant, it must evaluate that evidence alone to determine whether the petitioner has carried his burden by clear and convincing proof.

Walton v. State, 98 Idaho 442, 445, 566 p.2d 765, 768 (1977). Our sister court further explained that:

uncontroverted evidence from the petitioner does not automatically mean that the petitioner has met this burden, for the court might disbelieve the credibility of the witnesses. If the trial court views all the evidence and determines that the presumption was not overturned, then it is not necessary for the state to go forward with evidence.

Id. at 445, 566 P.2d at 768.

We find that the Idaho court's analysis correctly states the law pertaining to this issue. The presumption and procedure outlined above are founded, on one hand, in our obligation under the constitution and its supremacy clause to ensure the integrity of the extradition process. Florida may not provide sanctuary to those fleeing justice in her sister states, thereby turning this

nation's criminal justice system into a game whose outcome rests largely on whether the accused can cross a border. See Doran, 439 U.S. at 287. On the other hand, the constitution forbids a state from exercising its extradition powers based on false] accusations, simple ignorance of the law or wanton abuse of process. Every state has an equal obligation to see that no such attempt is successful and, simultaneously, that any corrective measures it takes will preserve the constitutional policy underlying extradition. Id. at 288.

Accordingly, we approve the district court's opinion and its action in remanding the matter to the trial court for further proceedings consistent herewith.

It is so ordered.

OVERTON and SHAW, JJ., and ADKINS, J. (Ret),
Concur. McDONALD, C.J. and EHRLICH, J.,
Dissent
NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the
District Court of Appeal - Certified Direct
Conflict of Decisions

First District - Case No. AZ-233

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